

**THE REQUIREMENT OF COHERENCE IN EU EXTERNAL RELATIONS LAW AND
THE COHERENCE OF EU EXTERNAL ACTION TOWARDS SUB-SAHARAN
AFRICA: MALI AS A CASE STUDY**

By

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Abstract

The principal aim of the Lisbon Treaty is to address the pre-Lisbon concerns about the coherence of EU action. In this regard, coherence is the simple litmus test for EU external action in the post-Lisbon era.

This thesis investigates the coherence of EU external action towards Sub-Saharan Africa (SSA) in the post-Lisbon era in light of the requirement of coherence in EU external relations law and the introduction of the HR/VP and the EEAS in her service with the aim of enhancing coherence in EU external action. The principle of coherence governs the interaction between various policy strands of EU external action (horizontal coherence). The importance of coherence is linked to visibility and efficiency based on the effective use of EU resources, as well as to the credibility of the Union. This thesis concentrates on coherence in the interaction between EU policies towards SSA using the key EU policies towards the region namely development policy, trade policy, the CFSP and the CSDP. The regional context facilitates the analysis of the different strands of external action policies where, despite of or perhaps due to the Treaty of Lisbon, the different instruments of EU foreign policy and lines of competence demarcation between their institutions are still mired in complexity. Although the focus is on coherence, the specialised regional focus of the thesis also facilitates a broader understanding of the nuances in the implementation of EU external relations law and EU external policies in different contexts especially in the post-Lisbon era. Using Mali as a case study, the thesis submits that while it can be argued that policy coherence for development (which is a key requirement in EU external action towards SSA) cannot be certainly determined, Mali clearly illustrates incoherence *vis-à-vis* synergy in the sequencing of available policy options in EU external action towards SSA. The thesis also discussed the limits and prospects of coherence in EU external action despite the changes made at Lisbon.

DEDICATION

To

The loving memory of

Late Mrs Benedeth Okemuo

and

Late Mr Livinus Ikechukwu Okemuo

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Council Decision 2010/565/CFSP on the European Union Mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (EUSEC RD Congo) [2010] *OJ L*248/59

Council Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces (EUTM) [2010] *OJ L*44/16

Council Decision 2011/537/CFSP amending and extending Decision 2010/576/CFSP on the European Union Police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of Congo (EUPOL DR Congo) [2011] *OJ L*236/8

Council Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger) [2012] *OJ L*187/48

Council Decision 2013/133/CFSP of 18 March 2013 appointing the European Union Special Representatives for the Sahel *OJ L*75/29

Council Decision 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) [2013] *OJ L*14/19

Council Decision 94/578/EC of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development [1994] *OJ L*223/23

Council Decision 94/942/CFSP and Council Regulation (EC) No. 3382/94 [1994] *OJ L*367/31

Council Decision adopting the Council Rules of Procedure (2009/ 937/EU) (2009) *OJ L*325/35

Council Decision establishing the organisation and functioning of the European External Action Service [2010] *OJ L*201/30

Council Decision of 12 February 2008 establishing Statutes for the Euratom Supply Agency [2008] *OJ L*41/15

Council Decision of 13 July 2009 on the signing and provisional application of the Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part (2012/196/EC) [2012] *OJ L*111/1

Council Decision of 20 November 2008 on the signature and provisional application of the interim agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part (2009/152/EC) [2009] *OJ L*57/1

Council Joint Action 2002/589/CFSP on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP [2002] *OJ L*191/1

Council Joint Action 2003/423/CFSP on the European Union military operation in the Democratic Republic of Congo (*ARTEMIS*) [2003] *OJ L*143/50

Council Joint Action 2004/847/CFSP on the European Union Police Mission in Kinshasa (DRC) regarding the Integrated Police Unit (EUPOL ‘Kinshasa’) [2004] *OJ L*367/30

Council Joint Action 2005/355/CFSP on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of Congo (DRC) (EUSEC) [2005] *OJ L*112/20

Council Joint Action 2005/557/CFSP on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan (AMIS) (2005) *OJ L*188/46

Council Joint Action 2006/319/CFSP on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (EUFOR DRC) [2006] *OJ L*116/98

Council Joint Action 2007/405/CFSP on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo) [2007] *OJ L*151/46

Council Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic (Tchad/RCA) [2007] *OJ L*279/21

Council Joint Action 2008/112/CFSP on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR Guinea-Bissau) [2008] *OJ L*40/11

Council Joint Action 2008/749/CFSP on the European Union military coordination action in support of UN Security Council resolution 1816(2008) (EU NAVCO) [2008] *OJ L*252/39

Council Joint Action 2008/851/CFSP on the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali Coast (EUNAVFOR Somalia, also known as ATALANTA) [2008] *OJ L*301/33

Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the ACP provided for in agreements establishing, or leading to the establishment of the Economic Partnership Agreements [2007] *OJ L*348/1

Council Regulation (EC) No. 1528/2007, 'Market Access Regulation'

Council Regulation (EU) 2015/322 of 2 March 2015 on the implementation of the 11th European Development Fund [2015] *OJ L58/1*

Council Regulation (EU) No 370/2011 amending regulation (EC) No 215/2008 on the Financial Regulations Applicable to the 10th European Development Fund, as regards the European External Action Service [2011] *OJ L102/1*

Council Regulation 1061/2009 establishing common rules for export [2009] *OJ L291/1*

Council Regulation 260/2009 on the common rules for imports [2009] *OJ L84/1*

Council Regulation 2641/84 on the strengthening of the commercial policy with regard in particular to protection against illicit commercial practices [1984] *OJ L252/1*

Council Regulation 265/2009 on common rules for imports from countries not members of the European Community [2009] *OJ L343/51*

Council Regulation 2658/87 [1987] *OJ L256/1*

Council Regulation 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the WTO [1994] *OJ L349/71*

Council Regulation 597/2009 on protection against subsidized imports from countries not members of the European Community [2009] *OJ L188/93*

Council Rules of Procedure annexed to Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU) [2009] *OJ L325/35*

Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part [2012] *OJ L111/2*

Internal Agreement between the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on the financing of European Union aid under the multiannual financial framework for the period 2014 to 2020, in accordance with the ACP-EU Partnership Agreement, and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies [2013] *OJ L210/1*

Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus on Development’, [2006] *OJ C*46/1

Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part (2000) *OJ L*317/3 (First Revision (2005) *OJ L*287/1; Second Revision (2010) *OJ L*287/3)

Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability [2006] *OJ L*327/1

Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a Financing Instrument for Development Cooperation [2006] (*OJ L*378/41)

Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers [2011] *OJ L*55/13

Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument contributing to Stability and Peace [2013] *OJ L*77/1

Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Financing Instrument for Development Cooperation for the period 2014-2020 [2014] *OJ L*77/44

Regulation (EU) no 527/2013 of the European Parliament and of the Council of 21 May 2013 amending Council Regulation (EC) No 1528/2007 as regards the exclusion of a number of countries from the list of regions or states which have concluded negotiations [2013] *OJ L*165/59

Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] *OJ L*303/1

Council Regulation 732/2008 applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) 1933/2006 and Commission Regulations (EC) 1100/2006 and (EC) 964/2007 [2008] *OJ L*211/1

Regulation (EU, EURATOM) 1080/2010 amending the staff regulations of Officials of the European Communities and the conditions of Employment of Other Servants of those Communities [2010] *OJ L*311/1

Regulations 416/2001 [2001] *OJ L*60/43

The Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus on Development’, [2006] *OJ C*46/1
The Single European Act [1987] *OJ L*169

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] *OJ C*306/01

Trade, Development and Co-operation Agreement (TDCA) with the EU ([1999] *OJ L*/311

Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts [2001] *OJ C*80/01

Common Positions 95/544/ CFSP on ‘visa restrictions on members of the Provisional Ruling Council and the Federal Executive Council and their families’

Single European Act, 17 February 1986 [1987] *OJ L*169

Maastricht Treaty, TEU or Union Treaty: Treaty on European Union, 7 February 1992 [1992] *OJ C*191/1

Treaty of Amsterdam Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997 [1997] *OJ C*340/1

Treaty of Nice Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 26 February 2001 [2001] *OJ C*80/1

Treaty Establishing a Constitution for Europe, Rome, 29 October 2004 [2004] *OJ C*310/1

Treaty Establishing a Single Council and a Single Commission of the European Communities, 8 April 1965 (the Merger Treaty of 1965) [1967] *JO*152/1

ACP-EEC Convention of Lomé signed at Lomé on 28 February 1975 between the African, Caribbean and Pacific States of the One Part and the European Economic Community of the other part (Lomé I Convention) [1976] *OJ L*25/1

Second ACP-EEC Convention signed at Lomé on 31 October 1979 between the African, Caribbean and Pacific States of the One Part and the European Economic Community of the other part (Lomé II Convention) [1980] *OJ L*347/1

Third ACP-EEC Convention signed at Lomé on December 08 1984 between the African, Caribbean and Pacific States of the One Part and the European Economic Community of the other part (Lomé III Convention) [1986] *OJ L*86/3

ACP-EEC Convention signed at Lomé on 15 December 1989 between the African, Caribbean and Pacific States of the One Part and the European Economic Community of the other part (Lomé IV Convention) [1989] *OJ L*229/1 (amended [1998] *OJ L*156/3

Parliamentary Questions, Reply, [2009] *OJ C* 999/ 01

List of Abbreviation

ACP	Africa Caribbean and Pacific
AFET	Foreign Affairs Committee
AQIM	Al-Qaeda in the Islamic Maghreb
AU	Africa Union
BBC	British Broadcasting Corporation
CAP	Common Agricultural Policy
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
CGS	Council General Secretariat
CHOD	Chiefs of Defence Staff
CIMIC	Civil Military Cooperation
CIVCOM	Committee for Civilian Aspects of Crisis Management
CMC	Crisis Management Concept
CMCO	Civil-Military Coordination
CMPD	Crisis Management Planning and Directorate
COAFR	Africa Working Group
CONOPS	Concept of Operation
COREPER	Committee of Permanent Representatives
CPCC	Crisis Management Conduct and Capability
CSDP	Common Defence and Security Policy
CSO	Civilian Strategic Options

CSP	Country Strategic paper
DAC	Development Assistance Review
DCI	Development Cooperation Instrument
DDR	Disarmament, Demobilisation and Reintegration
DEVE	The Development Committee
DG	Directorate General
DRC	Democratic Republic of Congo
DROI	Human Rights Committee
EBA	Everything but Arms
ECJ	European Court of Justice
ECOWAS	Economic Communities of West African States
ECPDM	European Centre for Development Policy Management
EDC	European Defence Cooperation
EDF	European Development Fund
EEAS	European External Action Service
EFARev	European Foreign Affairs Review
ELJ	European Law Journal
ELR	European Law Review
ENP	European Neighbourhood Policy
EPA	Economic Partnership Agreement
ERRF	European Rapid Response Force
ESDC	European Security and Defence College
ESDP	European Security and Defence Policy
ESS	European Security Strategy

EU	European Union
EUMC	EU Military Committee
EUMS	EU Military Staff
EUSR	EU Special Representative
FAC	Foreign Affairs Council
FAC	Foreign Affairs Council
GAERC	General Affairs and External Relations Council
GAERC	General Affairs and External Relations Council
GSP	General System of Preferences
HoM	Head of Mission
HR/VP	High Representative for Foreign Affairs and Security Policy
HRCFSP	High Representative for the Common Foreign and Security Policy
IGAD	Intergovernmental Authority on Development
IGC	Intergovernmental Conference
IMD	Initiating Military Directive
INTA	International Trade Committee
JAES	Joint Africa EU Strategy
LDC	Least Developed Country
MDG	Millennium Development Goal
MFN	Most Favoured Nation
MNLA	National Movement for the Liberation of Azawad
MSO	Military Strategic Options
NATO	North Atlantic Treaty Organisation
NEPAD	New Partnership for Africa Development

NGOs	Non-Governmental Organisation
NIP	Nation Indicative Programmes
OAU	Organisation for Africa Unity
ODA	Overseas Development Assistance
OECD	Organisation for Economic Co-operation and Development
OHQ	Operational Headquarters
OpCdr	Operation Commander
OpCen	Operations Centre
OPLAN	Operation Plan
PAPED	Economic Partnership Agreement Development Programme
PCD	Policy Coherence for Development
PESCO	Permanent Structured Cooperation
PJCCM	Police and Judicial Cooperation in Criminal Matters
PSC	Political and Security Committee
PSO	Police Strategic Options
QMV	Qualified Majority Vote
RECs	Regional Economic Communities
RIP	Regional Indicative Programme
RSP	Regional Strategy Paper
SACU	South African Customs Union
SADC	South African Development Community
SEDE	Security and Defence Committee
SOFA	Status of Force Agreement
SOMA	Status of Mission Agreement

SSA	Sub-Saharan Africa
SSR	Security Sector Reform
TCDA	Trade and Development Cooperation Agreement
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
ToL	Treaty of Lisbon
TRII	Trade, Regional Integration and Infrastructure(JAES Partnership)
UEMOA	West African Economic and Monetary Union
UN	United Nations
UNSC	United Nations Security Council
VP	Vice President
WEU	Western European Union
WTO	World Trade Organisation

Chapter One

1.0. On the Coherence of EU External Action towards Sub-Saharan Africa (SSA): an Introduction

1.1. General Introduction

The Treaty of Lisbon¹ aims to address pre-Lisbon concerns about the overall coherence² of EU external action.³ Indeed, the process of Treaty reform which had started with the Laeken

1The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] *OJ* C306/01 (hereinafter the Lisbon Treaty). The Treaty came into force two years after in 2009 when it gained the requisite number of ratifications. For the amended Treaties, see Consolidated versions of the Treaty on European Union (hereinafter TEU) and the Treaty on the Functioning of the European Union (hereinafter TFEU), 2010/C 83/01 [2010] *OJ* C-83/01. For the story of the journey to Lisbon, see for example, Berman, P, *From Laeken to Lisbon: the Origins and Negotiation of the Lisbon Treaty* in Biondi A, *et al*, (eds.) *EU Law After Lisbon* (OUP, 2012), 3; and Craig, P, *The Lisbon Treaty – Law Politics and Treaty Reform* (OUP, 2012), p 1-25.

2Although the TEU and the TFEU speaks of ‘consistency’, the other language versions of these Treaties refer to ‘coherence’. The practice of the usage of these two words in the academic field of EU external relations law and policies varies amongst scholars, and there is as yet no consensus on the definition of the requirement (see pp 4-5 below). In any event, for ease of reference, this thesis will hereinafter adopt the term ‘coherence’ as a general approach. Nevertheless, this is not to say that the term ‘consistency’ is completely eschewed from the analysis. In contrast, it will be mentioned as is necessary in the course of this analysis.

3This is different from the coherence of EU law and policies in their internal implementation within EU Member States (see for example Prechal, S, and Van Roermund, B, *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (OUP, 2008)). With regards to external relations law and policies with which this thesis is concerned, it is noteworthy that this aspect of EU law which governs EU external relations is also referred to as, ‘EU international relations law’ or ‘EU foreign relations law’. The different variants in nomenclature are accepted in EU legal discourse (see for example Cremona, M, (ed.), *Developments in EU External Relations Law* (OUP, 2008); and Dashwood, A, and Maresceau, M, *Law and Practice of EU External Relations* (Cambridge University Press, 2008); and Koutrakos, P, *EU International Relations Law* (Oxford: Hart, 2006); and for a similar variant, Cremona, M, and De Witte, B, (eds.), *EU Foreign Relations Law* (Oxford: Hart, 2008). In the same vein, ‘EU international relations’, ‘EU foreign relations’, ‘EU foreign policy’ and ‘EU external action’ all refer to EU external relations. Indeed, while there is a difference between EU cooperation policies and its unilateral policies which are more generally regarded as foreign policy, it is arguable that all EU external policies are EU foreign policy. Indeed, although foreign policy has been narrowly defined as ‘relations between states’ (Smith, S, and Smith, M, *The analytical Background: Approach to the study of British Foreign Policy* in Smith, S, *et al*, (eds), *British Foreign Policy: Tradition, Change and Transformation* (London, Unwin Hyman, 1988), p 15), it has also contrastingly been defined broadly as the notion of ‘external relations’ (Clarke, M, ‘Policy processes in a Changing World’ in *British External Policy-Making in the 1990*’ (London: Macmillan for RIIA, 1992), p 72). With specific regards to the EU, references abound regarding the view that EU external relations is foreign policy for example, see in particular, Smith, K, *European Foreign Policy: What it is and What it does* (London: Pluto Press, 2002), especially p 8 where she explains that: “[...]the foreign policy of the EU is the capacity to make and implement policies abroad that promote the domestic values, interests and policies of European Union”; Sicurreli, D, *The European union’s Africa Policies: Norms, Interests and Impact* (Surrey: Ashgate 2010), p 37; Hill, C, *The Changing Politics of Foreign Policy* (New York: Palgrave, 2003), p 4); and Louis, J, ‘The European Union: from external relations to foreign policy’ (2007) 2 *EU Diplomacy Papers* 4, who argues that the distinction between EU external policies is artificial; also see in general Koutrakos, P, (ed.) *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar, 2011); Khaliq, U, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press, 2008); Keukeleire, S, and MacNaughton, J, *The Foreign policy of the European Union* (Basingstoke: Palgrave Macmillan, 2008); De Baere, G, *Constitutional Principles of EU External Relations* (OUP, 2008); Mannes, I, and Whitman, R, (ed.) *The Foreign Policies of European Union Member States* (Manchester University Press, 2000). For specific reference to the successive association

Declaration of 2001⁴ and culminated in the Treaty of Lisbon in 2007, placed the question of the requirement of coherence in EU external action high on the agenda. Although the issue of coherence has a long history in the field of EU external relations law and policies,⁵ these recent developments have led to an increasing academic interest in EU external relations law and policies in general,⁶ and to a focus on the requirement of coherence thereto in particular.⁷ Effectively, the requirement of coherence in EU external relations law and policies remain pertinent post as pre-Lisbon. An arguably simplistic reason for this is the retention of the traditional legal dynamics that *prima facie* hold implications for coherence. At the heart of these dynamics are the legal, institutional and procedural distinction between the strands of EU external relations policy under the ex-Community Pillar on the one hand, and the Common Foreign and Security Policy (CFSP), on the other hand.⁸ However, in addition, and perhaps more cogently, the pertinence of coherence in the post-Lisbon era stems from the attendant need

agreements with SSA as instruments of EU foreign policy, see Werner, F, 'The Association Agreements of the European Communities: A Comparative Analysis' (1965) 19 *IO* 2, p 245. Ultimately, this thesis does not distinguish between the different variants and will use any of them as is necessary. The other concerns the Lisbon Treaty aims to address are the efficiency and democratic legitimacy of the enlarged Union. These are regarded imperatives both with regards to internal and external dimensions of EU policies and law-making, but these are in any event outside the scope of this thesis.

4Laeken Declaration on the Future of the European Union, European Council, 14 – 15 December 2001, Annex I to Presidency Conclusions.

5See Chapter Two of this thesis.

6See for example fn 3 above; most recently Eeckhout notes that EU external relations law is a subject of great importance (see his Abstract for Eeckhout, P, *EU External Relations Law* (OUP, 2011)).

7See 1.2. below. This is not related to the similarly burgeoning interest in the related concept of 'coherenticism' espoused by 'coherentist' legal philosophers (see for example Araszkievicz, M, and Šavelka, J, (ed.), 'Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence' (2013) 107 *Law and Philosophy Library*; Hage, J, C, 'Law and Coherence' (2004) 17 *Ratio Juris*; Balkin, J, M, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *YLLJ* 105–76; Hurley, S, 'Coherence, Hypothetical Cases and Precedent' (1990) 10 *OJLS*, 221–51; for earlier works, *also see* Dworkin, R, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978); and Dworkin, R, *Law's Empire* (London: Fontana, 1986).

8As discussed in Chapter Two of this thesis, the Lisbon Treaty abolished the former three Pillar structure of the EU. However, although the Police and Judicial Co-operation in Criminal Matters (PJCCM) - the former Third Pillar previously known as the Justice and Home Affairs (JHA)) was subsumed into the ex-Community (the former First Pillar) at Lisbon, the legal distinction between the latter and the CFSP (the Former Second Pillar) has been retained. For this reason, Koutrakos argues that the Treaty abolished the pillars in all but name (see Koutrakos, P, 'Primary law and policy in EU external relations-moving away from the big picture' (2008) 33 *EL Rev* 666 at 668-70).

to investigate the effects of the Lisbon developments in practice.⁹ Indeed, Duke¹⁰ rightly notes that coherence is the simple litmus test for EU external action in the post-Lisbon era.¹¹

The principle of coherence governs the explicit ties between various policy strands of EU external action,¹² and not without good reasons. In academic materials¹³ and relevant EU policy documents¹⁴ coherence is linked to effectiveness and visibility. In practical terms, the needs underlying the requirement of coherence in EU external relations law and policies is not hard to identify or to agree with. For example, there is a need for the effective use of EU resources, which are undeniably limited.¹⁵ Closely tied to this, is the need to ‘maximize the effects of the desired outcomes’.¹⁶ Furthermore, it can be argued that credibility is an added value of coherence. In this regard, it has been suggested that the extent to which the EU ensures the coherence of its policies is directly relevant to its credibility as an international actor and also holds direct or indirect implications for the ability of the EU to intervene on the international scene.¹⁷ Against this backdrop, the Treaties expressly provide that the Union shall ensure the

9See for example, Okemuo, G, ‘The EU or France? The CSDP Mission in Mali and the consistency of EU-Africa policy’ [2014] 34 *Liverpool Law Rev.* 3, 217-240.

10Duke, S, ‘A difficult birth: the early days of the European External Action Service’ in Koutrakos, P, (ed.) ‘The European Union’s External Relations: a year after Lisbon’, *CLEER Working Papers* 2011/3.

11Ibid., p 69.

12Green Paper on relations between the European Union and the ACP Countries on the eve of the 21st Century: Challenges and options for a new partnership, COM (96) 570 (final) p 4.

13See for example Duke fn 10 above; and Koutrakos, P, ‘Security and Defence Policy within the Context of EU External Relations: Issues of Coherence, Consistency, and Effectiveness’ in Trybus, M, and White, N, (ed.) *European Security Law* (OUP, 2007), p 250; also see Hillion, C, ‘*Tous pour un, un pour tous!* Coherence in the external relations of the European Union’ in Cremona, fn 3 above, p 10.

14See for example, the Preamble to the Lisbon Treaty which refers to efficiency; and also Commission Communication ‘Europe in the World – some practical proposal for coherence, effectiveness and visibility’ COM (2006) 278 final); and ‘Enhancing coherence and efficiency between institutions and actors’ (2002), Final Report, Working Group VII, Section 5, CONV 459/02.

15See Koutrakos, fn 13 above, p 250 where he adds rationalisation of resource allocations and the prevention of duplication as added values of coherence.

16Ibid.

17Ibid.

coherence of its external actions and policies,¹⁸ and the High Representative for Common Foreign and Security Policy HR/VP with an EU External Action Service (EEAS) was created for this purpose.¹⁹

This thesis investigates the post-Lisbon coherence of EU external relations law and policies towards Sub-Saharan Africa (SSA).²⁰ As Amaya²¹ posits, context is essential when evaluating the coherence of an interpretation or an action.²² The regional context or focus will (1) facilitate

¹⁸See in particular Article 21(3) TEU and Article 7 TFEU; and Chapter Two of this thesis for other relevant provisions.

¹⁹Article 18(4) TEU; Article 27(3) TEU; also see Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010) *OJ L*201/30; and Council of the European Union, Press Release, 3010th Council meeting, General Affairs, Luxembourg, 26 April 2010, 8967/10 (Presse 89), p 8; and in general Chapter Two of this thesis (at 2.5.3.5. and 2.5.3.6.)

²⁰The Sub-Saharan Africa region is the region of Africa south of the Sahara (see Appendice II). The region harbours 49 of the 53 African countries (see Annex I) which are geographically divided into four regions namely Western Africa, Eastern Africa, Southern Africa and Central Africa. Otherwise, the countries of the region are organised along various regional economic and regional security lines (see Appendice III). It is noteworthy that although the EU does not have any specific regional approach to SSA, the EU recognises this region officially as illustrated in EU case law (see for example Case C-91/05 *Commission v Council (ECOWAS)* [2008] ECR I-3651, para 69), and in some EU policy documents (see for example Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Increasing the impact of EU Development Policy: an Agenda for Change, COM(2011) 637 final (hereinafter 'Agenda for Change'), p 9; European Commission, Green Paper EU Development Policy in Support of Inclusive Growth and Sustainable Development: Increasing the impact of EU Development Policy, Brussels, COM(2010) 629 Final, at para 4.2; European Commission, Humanitarian Policy towards SSA available at http://ec.europa.eu/echo/where/sub-saharan-africa/sub-saharan-africa_en, accessed 14 January 2015; also see European Court of Auditors, The European Development Fund (EDF) Contribution to a Sustainable Road Network in Sub-Saharan Africa (pursuant to Article 287(4) TFEU, second subparagraph), Special Report No 17, 2012); and for the recognition of EU external action towards the region by other ancillary organisations see for example Bossner, S, and Stang, G, 'The EU and Sub-Saharan Africa: An energy partnership?' (2014) EUISS *Issue Brief* No. 5; Faria, F, Crisis Management in Sub-Saharan Africa: the role of the European Union (2004) EUISS *Occasional Papers* No. 51; Vasconcelos, A, *et al*, 'WEU's Role in Crisis Management and Conflict Resolution in Sub-Saharan Africa', (1995) ISS, *Chaillot Papers* 22; Hoebink, P, 'The Coherence of EU Policies: Perspectives from the North and the South' (2005) Commissioned Study, Center for International Development Issues Nijmegen, Brussels, p 4, especially para 10; for recent independent academic research on EU and SSA see for example Kluth, M, 'The European Union and Sub-Saharan Africa – from intervention towards deterrence?' (2013) 1 *ASR* 22, p 19 – 29; and also Delpitte, S, 'The EU as an emerging coordinator in development cooperation: perspectives from Sub-Saharan Africa', (2013) 26 *Afrika Focus* 1, pp 99-107 (which is the report of a PhD research). Indeed, Sub-Saharan Africa is recognised as a region in every field of academic discipline, including in the legal field (see for example Onyema, E, 'Enforcement of Arbitral Awards in Sub-Saharan Africa', (2010) 26 *Arbitration International* 1, p 205-218). The reason why the region is chosen as a context for this study is discussed at 1.2. below.

²¹See Amaya, A, 'Ten Theses on Coherence in Law' in Araszkievicz and Šavelka, fn 7 above, p 243.

²²*Ibid*, p 247; also see Margolis, J, 'The Locus of Coherence', 7 *Linguistics and Philosophy* no. 1, where context is explained as the clue in assessing coherence; and Kaufmann-Kohler, G, 'Is Consistency a Myth?' in Gaillard, E, and Banifatemi, Y, (ed.) *Precedent in International Arbitration* (Geneva: IAI Series on International Arbitration No. 5, 2008), p137; also see Robertson, C, 'How the European Union functions in 23 languages', a paper presented at the Department of Professional and Intercultural Communication of the Norwegian School of Economics and

the analysis of the different strands of external action policies where, despite of or perhaps due to the Treaty of Lisbon, the different instruments of EU foreign policy and lines of competence demarcation between their institutions are still blurred or mired in complexity. Moreover, (2) The shared competence nexus between EU development and security policies, which is arguably more prevalent in the context of EU relations with SSA,²³ is illustrative. The specialised regional focus also (3) facilitates a broader understanding of the nuances in the implementation of EU external relations law and policies in different contexts. In this way, (4) the thesis adds to the existing scholarship in this field of EU law which has recently been witnessing a rise in specialised focus on different regional contexts.²⁴ Nevertheless, at all times, the pivot of the analysis remains the extent of the coherence of EU external action towards SSA in the light of the requirement of coherence in EU external relations law.

1.2. Why Sub-Saharan Africa?

The reason for adopting SSA as a regional focus is not far-fetched. From all indications, SSA is arguably the best comprehensive regional context or case study for an analysis of the coherence of EU external relations law and policies. In this regard, this region provides a major empirical field of examination of the coherence of EU foreign policy.

Business Administration, 30 September 2011, p 14 (where he states that terms take meaning from context), available at https://www.nhh.no/Files/Filer/institutter/fsk/Synaps/28-2013/Robertson_28_2013.pdf, accessed 15 January 2015.

²³See in general Chapter Two and Chapter Five of this thesis. Indeed, the first EU case on the security-development nexus namely the *ECOWAS* case (Case C-91/05, fn 20 above) arose in the context of EU external action towards SSA.

²⁴For example, see Hillion, C, 'The Evolving System of EU External Relations as Evidenced in the EU Partnerships with Russia and Ukraine', PhD Dissertation (2005), University of Leiden. Indeed, many of the edited series on the law of EU external relations including with regards to the CFSP contain chapters on EU relations with different regions, and sometimes even countries (see for example, Cremona, fn 3 above; Trybus and White, fn 12 above; Dashwood, A, and Hillion, C, *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000); and Blockmans, S, (ed.), *The European Union and Crisis Management: Policy and Legal Aspects* (The Hague: TMC Asser, 2008)).

EU external action towards SSA is a classic field of EU external relations and arguably, the Union's oldest and most comprehensive external relations or foreign policy. It is beyond the specifics of foreign policy in relation to EU enlargement which holds possibilities of accession to the EU for the relevant countries. It is also beyond the European Neighbourhood Policy (ENP) which deals with the Union's closest neighbours, including the North African region.²⁵ Furthermore, EU external action towards SSA is also different from external action within the context of the World Trade Organisation (WTO) which deals solely with international trade.

Deeply rooted in the history of the EC and EU,²⁶ EU relations with SSA are a particularly important aspect of EU development cooperation policy²⁷ and, more widely of its external action. Until the early 1990s, this development cooperation policy focused exclusively on trade and development aid.²⁸ This is clearly illustrated in the pre-90s successive bilateral trade and development agreements governing this cooperation²⁹ discussed in Chapter Three and Chapter

25The ENP covers 16 of EU's closest neighbours namely, Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, The Palestinian Authority, Syria, Tunisia and Ukraine. While five of these countries namely Algeria, Egypt, Tunisia, Morocco, and Libya) are within the African continent, they are north of the Sahara (see Appnedice I) and are therefore outside the scope of this thesis.

26Martenczunk, B, 'From Lomé to Cotonou: the ACP-EC Partnership Agreement in a Legal Perspective' (2000) 5 *EFA Rev.* 461; also see Chapter Two of this thesis. In general, although EU relations with SSA dates back to the Communities, this thesis does not differentiate between Community law and EU law. However, references are made to the EC/ex-Community and the EU/Union as is necessary. This sits well with the view that European law is 'the law of the European Community and Union' (see Koutrakos, P, and Evans, M, (eds.) *Beyond the Established Legal Orders* (Oxford: Hart, 2011), p 1; and Eeckhout, P, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, 2004), p 4; also see Declaration III 'European Union declaration on institutional changes resulting from the entry into force of the Treaty of Lisbon', attached to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part (hereinafter the Cotonou Agreement) (2000) *OJ L317/3* (First Revision (2005) *OJ L287/1*; Second Revision (2010) *OJ L287/3*).

27See Chapter Three of this thesis on EU development cooperation policy towards SSA

28Nkundabagenzi cited in Kronenbeger, V, and Wouters, J, *The EU and Conflict Prevention: Policy and Legal Aspects* (Cambridge University Press, 2004), p xx; also see in general Chapters Two, Three and Four of this thesis.

29Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed at Yaoundé on 20 July 1963 (Yaoundé I) [1964] *OJ L93/1430*; Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed on 29 July 1969 (Yaoundé II) [1970] *OJ L282*; ACP-EEC Convention of Lomé signed at Lomé on 28 February 1975 between the African, Caribbean And Pacific States of the One Part and the European Economic Community of the other part (Lomé I Convention) [1976] *OJ L25/1*; Second ACP-EEC Convention signed at Lomé on 31 October 1979 (Lomé II Convention) [1980] *OJ L347/1*; ACP-EEC Convention signed at Lomé on December 08 1984 (Lomé III Convention) [1986] *OJ L86/3*; and ACP-EEC Convention signed at Lomé

Four of this thesis. However, by the year 2000, the Union's 'modern and flexible development policy' had evolved to take a broader approach to defining and addressing poverty.³⁰ This was reflected in the new framework agreement signed in 2000 namely the Cotonou Partnership Agreement³¹ (hereinafter the Cotonou Agreement). This framework agreement which currently governs EU relations with SSA covers a wide range of policy fields. These include trade (and related aspects of the Common Commercial Policy (CCP) which all could conveniently be termed economic policies), development aid policy, and a political dimension which includes aspects of security policy.³²

Beyond this comprehensive development cooperation under the Cotonou Agreement, the EU also conducts its autonomous foreign and security policy towards SSA through the instruments of its CFSP. An integral part of the CFSP is the Common Security and Defence Policy (CSDP).³³

on 15 December 1989 (Lomé IV Convention) [1989] *OJ* L229/1 (amended [1998] *OJ* L156/3. These are essentially bilateral agreements (see Case C-316/91 *Re the European Development Fund: Parliament v Council* [1994] 3 *CMLR* 149).

30See Case C-377/12 *Commission v Council* [2014] Judgment of the Court (Grand Chamber) of 11 June 2014, especially para 37; Case C-91/05 (*ECOWAS*), fn 20 above, especially paras 64-67; Case C-403/05 *Parliament v Commission* [2007] ECR I-0000, para 57; Case C-268/94 *Portugal v Council* [1996] ECR I-6177, especially para 13; also see Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus on Development', [2006] *OJ* C46/1, especially para 12; and A Secure Europe in a Better World--European Security Strategy' (ESS), Brussels, December 12, 2003, p14; and also Peers, S, 'Fragmentation or evasion in the Community's development policy? The impact of *Portugal v France*' in Dashwood and Hillion, fn 24 above, p 112.

31See the Cotonou Agreement, fn 26 above. Although the Cotonou Agreement was signed between the EU and its Member States on the one part and the wider African, Caribbean and Pacific (ACP) group of states on the other part, the comprehensive substance of the agreement applies more to EU relations with SSA. This is as much for other objective reasons as for historical reasons (see 2.2.4. of this thesis for the historical evolution of EU external action towards SSA; also see Annex 2 attached to this thesis for the list of ACP states including those in SSA). It is noteworthy that while the Republic of South Africa (RSA) is in SSA, it is not fully 'associated' under the Cotonou Agreement as the other countries of SSA (see Protocol 3 on South Africa attached to the Cotonou Agreement, fn 26 above). In contrast to the latter, RSA is not a party to the trade chapters of the Cotonou Agreement but rather has its own specific Trade, Development and Co-operation Agreement (TDCA) with the EU ([1999] *OJ* L/311). The EU does not consider RSA as a developing country in the strict sense, and only the political provisions of the Cotonou Agreement applies to RSA. RSA is therefore outside the scope of this thesis.

32Indeed, the Cotonou Agreement has been controversially termed a 'spaghetti bowl' of EU policies (see Orbie, J, 'EU Trade and Development Policy: On Pyramids and Spaghetti Bowls' (2007) *LX Studia Diplomatica* 1, p 109, where the spaghetti metaphor is used to describe the complexity of EU trade and development relations with the political South in general).

33This policy was known as the ESDP (an abbreviation for its precursor the European Security and Defence

Although it is not uncommon to see the CFSP used as an umbrella term covering the EU activities under the CSDP, the latter is *de facto*, if not *de jure* distinct from the former.³⁴ Accordingly, this thesis considers the two as distinct aspects of EU external action meriting separate analysis. This is due to the distinct functional and institutional logic of the CSDP.³⁵ For example, while the CFSP functionally deals with politics and diplomacy as these relate to foreign and security policy,³⁶ the CSDP distinctly provides the Union with operational capacity for civilian missions and military operations, as well as technical supports relating to these aspects of security policy.³⁷ The CSDP is a critical autonomous instrument of EU external action in general, and towards SSA in particular.³⁸ Indeed, in no other region of EU external action is instability as prevalent as in SSA. It follows that EU external action towards SSA is distinctly multifaceted. This is with regards to both the legal instruments of EU external relations law and policies and with regards to the relevant institutional frameworks. Attendant to these is the unavoidable overlap in practice in the interaction between policy objectives. Illustrative is the

Policy) pre-Lisbon. This (ESDP) has therefore been established even in the official language use. Nevertheless, this thesis will stick to the CSDP (the abbreviation for the Common Defence and Security Policy) as it was renamed at Lisbon.

34See for example European Commission, EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission (HR/VP) Statement on EEAS Review, European Parliament/Strasbourg, 12 June 2013, SPEECH/13/530, where the HR/VP talks about ‘the need for faster and more effective CFSP and CSDP procedures’; also see *The EU and Africa: Towards a Strategic Partnership* Council of the European Union, Brussels, 19 December 2005 15961/05, paragraph 4(a), where a distinction is made between the two; The House of Lords EU Committee, European Union - Thirty Fourth Report (2006) 1 *HL Paper* 206-I para 299; and Van Vooren, B, and Wessel, R, *EU External Relations Law, Text, Cases and Materials* (Cambridge University Press, 2014), p 400. Koutrakos, P, *The EU Common Security and Defence Policy* (OUP, 2013), especially Chapter 2; and also Koutrakos, P, ‘Primary law and policy in EU external relations – moving away from the big picture’ (2008) 33 *ELR* 671. Indeed, although it was not pursued, an option was put forward at the 1996 Intergovernmental Conference (IGC) to establish the security and defence policy (CSDP) as a Fourth Pillar in the former three Pillar structure (see Heisbourg, F, ‘European Defence: Making it Work’, ISS *Chaillot Papers* 42, September 2000, p 27).

35See Chapters Five and Six of this thesis.

36See Chapter Five of this thesis.

37See Chapter Six of this thesis.

38Out of the thirty-four CSDP missions that have so far been carried out by the EU, sixteen were in SSA, including the first extra-regional EU military operation (see Chapter Six of this thesis for a full analysis of the CSDP in SSA). Otherwise, a list of the CSDP missions and operations is available at <http://www.csdpmap.eu/mission-chart>, accessed 17 February 2014.

interaction between development cooperation policy and the autonomous instruments of EU security policy as framed within the CFSP and the CSDP.³⁹ A second dimension could be seen in the interaction between the distinct objectives of trade policy and development policy under the entwined trade and development cooperation policy.⁴⁰ In general, not only is development indissolubly linked to security, but these two policy aspects are also linked to trade.⁴¹ Hence the need for an overall coherence between the different policy aspects.

With specific regards to the needs underlying the requirement of coherence in EU external relations law and external action, this is arguably of most importance in the context of EU external action towards SSA. For example, with regards to the link between coherence and credibility, it is arguable that EU external action towards SSA is one of the most visible fields of EU external action and hence a major reflection of the coherence of EU external action to the world.⁴² Furthermore, the link between coherence and effectiveness is well alive in this

39For a recent investigation of the interaction between development policy and security policy in the context of EU external action towards SSA, see Orbie, J, and Del Biondo, K, 'The European Union's "Comprehensive Approach" in Chad: Securitisation and/or Compartmentalisation?' (2015) 29 *Global Society* 2, p 243-259. However, in the context of this thesis see Chapters Three and Six of this thesis on development policy and the CSDP respectively.

40See Chapters Three and Four on development policy and trade policy respectively.

41On the link between trade and other aspects of EU foreign policy see in general Koutrakos, P, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart 2001); and also Dehoussie, F, 'After Amsterdam: A report on the Common Foreign and Security Policy of the European union (1998) 9 *EJIL* 3, 525) who explains that "most foreign policy decisions interconnect with international economic co-operation or defence". However, also see in general, fn 3 above.

42To these may also be added the issue of the contending Chinese inroad into SSA where the EU has established critical foreign policy interests (see for example, Moody, A, and Chao, W, 'China "stepped into the breach"', *CHINA DAILY*, April 11-17, 2014, p 31). Significantly, these go beyond trade development and security, to include, inter alia, a cross-cutting crucial value like human rights. It is arguably undeniable that a lack of coherence of EU policies in the region and the attendant impact on EU credibility thereto, could contribute to strong Chinese foothold in the region, with the 'potentials' of endangering EU interests and the values EU promotes in the region (for an analysis of the difference in the approaches of the EU and China to Africa's development see for example Carborne, M, 'The European Union and China's rise in Africa: competing visions, external coherence and trilateral cooperation (2011) 29 *JCAS* 2, 203-221; and also Grauls, P, and Stahl, A, 'European development policy towards sub-Saharan Africa: Challenges of the growing Chinese presence', (2010) *Émulations*, n°7. To manage the differences between the two, the EU initiated a trilateral cooperation between the EU, Africa and China (see European Commission, 'The EU, Africa and China: Towards trilateral dialogue and cooperation', COM (2008) 654 final, Brussels). However, it is arguable that cooperation neither completely eliminates national or regional interests, nor the differences in values. For example, while EU uses aid conditionality to promote human rights, the rule of law and democracy and good governance, China's development policy is without conditionality. These

context. Indeed, the geographical proximity between Europe and Africa means that ineffective EU policies hold with it some political and economic implications for Europe itself. For example, not only since the migrant crisis in the Mediterranean,⁴³ there can be little doubt that Europe is often exposed to the effects of extreme poverty or violent conflicts in SSA.⁴⁴ Suffice it to state that the need for coherence in EU external action is also arguably more pertinent in the context of EU external action towards SSA. Remarkably, EU credibility in much of the ACP States, and SSA in particular, is already reported to be at an all-time low.⁴⁵

Within the limited confines of this thesis, it is impossible to examine all the 49 countries of SSA. Consequently, a country case study of Mali is provided. This is mainly for topical reasons. Mali is the most recent country of SSA where the need for an all-EU approach bordering on the construction of a united whole arose. As discussed below,⁴⁶ an all-EU approach bordering on the construction of a united whole is the essence of coherence in EU external action. Mali is one of the three initial 'core' countries that benefit from the EU Strategy for Security and

are different foreign policy ideals that both are unlikely to successfully impose on each other).

43See for example, BBC News 'Mediterranean migrant crisis: EU refugee quotas to be proposed', available at <http://www.bbc.co.uk/news/world-europe-32685942>, accessed 15th May 2015.

44For example, in justifying aid to Africa under the Lomé framework, the Commission explicitly noted that if nothing is done to narrow the gap between rich and poor countries, the consequence could be violent conflict to which Europe would be highly exposed (European Commission, 'Community Aid to the Third World: the Lomé Convention', European File 17/79, October 1979 available at http://aei.pitt.edu/4486/01/001984_1.pdf, accessed 30 August 2010); most recently, "Europeans have recognised that African economic prosperity is essential for European prosperity..." (European Commission (2007), Communication to the European Parliament and the Council, From Cairo to Lisbon- The EU-Africa Strategic Partnership, COM (2007) 357 final, 2); also see in general Morel, E, *Africa and the peace of Europe* (New York: B.W. Heusch, 1917); and Vasconcelos, fn 20 above. Furthermore, as noted by Dr Nicholas Westcott, Managing Director Africa, European External Action Service (EEAS), millions of Europeans live in Africa (Dr Nicholas Westcott, Keynote Address, delivered to the EUISS conference on EU-Africa foreign policy after Lisbon, 18 October 2011). There is no doubt that the safety and prosperity of these millions of Europeans in Africa are important to Europe.

45Mackie, J, *et al*, 'Bridging the credibility: challenges for ACP-EU relations in 2011', *Policy and Management Insights*, ECDPM, No. 2, December, 2010). It is noteworthy that this does not detract from the Union's positive contributions (see for example the conclusions in Khaliq, fn 3 above, especially p 447. Indeed, the positive contributions of the EU to SSA are undeniable and are well illustrated in subsequent Chapters on the distinct EU policies towards the region).

46See 1.2. below.

Development in the Sahel (hereinafter the Sahel Strategy)⁴⁷ - itself a new comprehensive EU policy towards the Sahel sub-region of SSA. The Sahel,⁴⁸ a band of desert stretching across Africa⁴⁹ is in general marked by poverty and fragility.⁵⁰ In recent times, the entire region has been struck by a severe multi-dimensional crisis and volatility reportedly exacerbated by the region's location as an uncontrolled passageway between the troubled Maghreb in the north and the piracy-afflicted Gulf of Benin in the South.⁵¹ Due to the geographical proximity of Europe to the region, the EU and its Member States have vested interests in the region's progress and stability.⁵² The Sahel Strategy was a response to these challenges.⁵³ Although, the Sahel Strategy is the key framework for EU action at both individual and collective levels to help countries in the wider Sahel-Saharan region address key security and development challenges,

47European External Action Service, Strategy for Security and Development in the Sahel, EEAS, 2011 (hereinafter the Sahel Strategy), available at http://eeas.europa.eu/africa/docs/sahel_strategy_en.pdf, accessed 12 January, 2013. The Sahel Strategy is the key framework for EU action at both individual and collective levels to help countries in the wider Sahel-Saharan region address key security and development challenges. The three initial core countries are Mali, Niger and Mauritania. However, the Strategy was extended to Burkina Faso and Chad in 2014. It is important to note that the Sahel Strategy is different from The EU Strategic Framework for the Horn of Africa (See Council of the European Union, Council Conclusions on the Horn of Africa, 3124th Foreign Affairs Council meeting, Brussels, 14 November 2011). Also adopted in 2011, the latter is the political umbrella of EU actions in the Horn of Africa. It takes a regional approach to the eight countries that are members of the Intergovernmental Authority on Development (IGAD) namely, Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan, South Sudan and Uganda.

48See Appendice II attached to this thesis.

49From Senegal in the West to Eritrea in the East (Ibid.).

50To be labelled a 'fragile state' is not something any country in Africa welcomes. Fragility does not only carry the stigma of incapacity and lack of progress, poverty, violence and poor governance, but also implies that a country is unable to borrow on the market and faces stringent conditionalities put in place by international financial institutions such as the World Bank (Cilliers, J, and Sisk, T, D, 'Africa's fragile states need extra help', *ISS Today*, 4 December 2013, available at <https://www.issafrica.org/iss-today/africas-fragile-states-need-extra-help> Accessed 12 February 2015).

51Ould-Abdallah, A, 'Why the Sahel urgently needs an EU backed security framework', January 15, 2014, <http://europesworld.org/2014/01/15/why-the-sahel-urgently-needs-an-eu-backed-security-framework/#.Vf0jTHjFsdU>, accessed 12 September 2015.

52Including countering the establishment of terrorist safe havens, drug trafficking, organised crime, unchecked migration and safeguarding access to strategic resources (Ould-Abdallah, A, 'The EU has a role to play, but Africans must lead', January 15, 2014, available at <http://europesworld.org/commentaries/the-eu-has-a-role-to-play-but-africans-must-lead/#.Vf0ecHjFsdU>, accessed 12 September 2015; also see Reitano, T, and Shaw, M, 'Failure to control drug trafficking aggravates Mali crisis 31 May 2013, available at <https://www.issafrica.org/iss-today/failure-to-control-drug-trafficking-aggravates-mali-crisis>, accessed 12 September 2015); and the Sahel Strategy fn 47 above, p 2 (at fn 1) where it is pointed out that there were also kidnapping of European nationals .

53Ibid.

Mali's recent crisis has put it at the centre of EU action in the Sahel, with a wide range of EU tools most recently deployed there.⁵⁴

Mali's underdevelopment and Least Developed Country (LDC)⁵⁵ status is not in doubt. Since 1971, Mali has always ranked as one of the world's least developed countries. In 2010, the United Nations Development Programme's (UNDP) Human Development Index ranked Mali 160th of 169 countries, and by 2011 it ranked 175 out of the 187 countries listed.⁵⁶ There was a regression in 2013 when the country was 182 out of 186 countries listed in the Human Development Report.⁵⁷ Although progress has been made since then, the performance is still abysmal as the 2014 report places it at 176 out of 187 countries.⁵⁸ As a result of its abysmal development index, aid has always played a significant role in Mali. In fact, due to its high level of aid dependency for fighting poverty, Mali has become a donor's darling and a 'testing ground' for new aid modalities.⁵⁹ Most recently, an international Donor Conference for Development in Mali was held in Brussels to mobilise international support for development and peace in Mali.⁶⁰ This was based on the understanding that the challenges Mali is facing also

⁵⁴The European Union and the Sahel, EEAS Factsheet, February 2014. The implications of the recent military coup in Burkina Faso for the sub-region is a question whose answer lies in the future, and also outside the scope of this analysis.

⁵⁵LDC's are recognised as the "poorest and weakest segment" of the international community. They are highly disadvantaged in their development process and risk, more than other countries, failure to come out of poverty. As such, the LDCs require special support from the international community (*The Least Developed Countries: Things to Know, Things to Do* (NY: UN-OHRLS, 2009), p 2).

⁵⁶See European Union External Action, Fact Sheet, the European Union and the Sahel, Brussels, 06 February 2014, 140206/01, p 4).

⁵⁷See the UNDP's Human Development Report, 2013, p 1146.

⁵⁸See UNDP 2014 Human Development Report, available at <http://www.undp.org/content/undp/en/home/presscenter/events/2014/july/HDR2014.html>, accessed 30 September 2015.

⁵⁹Such as budget support and other programme-based approaches (see Loquai, C, 'Supporting domestic accountability in developing countries: Taking stock of the approaches and experiences of German development cooperation in Mali' (ECDPM *Discussion Paper* No. 115, July 2011), p 1).

⁶⁰See Together for a new Mali, Donor Conference for Development in Mali, Brussels, 15 July 2013, available at <http://donor-conference-mali.eu/together-new-mali>, accessed 20 August 2015.

weighs on the future of the region, the African continent and, on a wider level, the whole world.⁶¹

In contrast to its development profile, the history of Mali's instability is mired in controversy. For example, Mali has been presented as a country once considered a model of democratic transition⁶² and historical stability⁶³ in Africa. However, it has also been suggested that Mali has been repeatedly subjected to political, economic and ecological turmoil since independence.⁶⁴ In any event, the compound effect of the crisis and other profound obstacles to development⁶⁵ means that the whole of EU approach is employed in EU external action towards Mali. This presents it as a veritable case study out of the 49 countries of SSA, and out of the 5 countries of the Sahel sub-region of SSA to which the Sahel Strategy apply. Interestingly, Mali is also one of the countries of SSA associated to the ex-Community under Part IV of the Treaty of Rome.⁶⁶ This means it also has historical relevance even within the geographical focus of this thesis.⁶⁷ This is significant in so far as the thesis is a legal analysis set in its historical and political contexts.⁶⁸ Suffice it to state that Mali inspires a reflection on a geographically focused,

61Ibid.

62For example, see in general, Zounmenou, D, 'Mali's Unfortunate Military Coup an Unnecessary Setback for Democracy', ISS, Pretoria, 24 March 2012, available at <https://www.issafrica.org/iss-today/malis-unfortunate-military-coup-an-unnecessary-setback-for-democracy>, accessed 12 August 2015; and Souaré, I, & Handy, P, 'Mali: A Model for Constitutional Reform in Africa', ISS Pretoria, 10 May 2010, available at <https://www.issafrica.org/iss-today/mali-a-model-for-constitutional-reform-in-africa>, accessed 12 August 2015.

63Mali-Communaute europeenne, Document de strategies pays et programme indicatif national pour la periode 2008-2013, p, 6, available at http://ec.europa.eu/europeaid/sites/devco/files/csp-nip-mali-2008-2013_fr.pdf, accessed 25 October 2015.

64Brigaldino, G, 'Managing European Aid Resources in Mali' in Carlsson, J, *et al*, (ed.) *Foreign Aid in Africa: Learning from Country Experiences* (Nordiska Afrikainstitutet, 1997), p 145.

65Ibid, p 128. For example, Mali is not only an LDC but also a Landlocked LDC (LLDC) with implications for its trade with the outside world including the EU (see further Chapter Four of this thesis (at 4.5.); and also see Chapter Three (at 3.5.) for the relevant dimensions of Mali's poverty).

66Mali was one of the first SSA associates to the EU under Part IV of the Treaty of Rome. Hence, its cooperation with the EU began in 1958, and it became independent from France in 1960. See Chapter Two of this thesis (at 2.2.4.1.) for the historical evolution of EU external action towards SSA.

67Namely SSA.

68See 1.4. below.

evidence-based assessment of the dynamics of the coherence of EU external towards SSA in the light of the requirement of coherence in EU external relations law.

In the remaining sections of this introductory chapter, the aims of this thesis and research questions will be outlined, followed by a description of the methodology used. An overview of the chapters of this thesis will also be provided. However, prior to these, a working definition of coherence in the context of EU external action will be introduced.⁶⁹ This is in contrast to the analysis of the requirement of coherence in EU external relations law which is done elsewhere in this thesis.⁷⁰

1.3. Consistency or coherence: defining the working concept

It is beyond the scope of this thesis to repeat all the previous debates on the relationship between the closely related concepts of coherence and consistency in the field of EU external relations law. The aim of this section is to provide a pertinent overview of these in order to define the working concept for the purposes of this thesis. As mentioned earlier,⁷¹ the English language version of the Treaties speak of ‘consistency’. Contrastingly, other language versions refer to ‘coherence’.⁷² While these are similar concepts, they do not always mean exactly the same. Indeed, Wessel notes that in legal theoretical analysis as in other fields of scholarly endeavour,⁷³ the concepts of consistency and coherence are often distinguished.⁷⁴ He explains that consistency in law is the absence of contradictions. Coherence, on the other hand, refers to

⁶⁹See 1.3. below.

⁷⁰See 2.5. below.

⁷¹See fn 2 above.

⁷²For example, the French, the Italian, Spanish, and German versions of the Treaties, refer to ‘cohérence’, ‘coerenza’, ‘coerencia’ ‘Kohärenz’ respectively. These words, and the wordings of other language versions of the Treaties translate to ‘coherence’ (see Wessel, R, *The European Unions’s Foreign and Security Policy: a Legal Institutional Perspective* (The Hague: Kluwer, 1999), p 297 for this, and for other language versions).

⁷³See for example Araszkiewicz and Šavelka, fn 7 above.

⁷⁴Wessel, fn 72 above, p 297.

positive connections.⁷⁵ This is the most widely expressed view among EU legal scholars working in this field.⁷⁶ Significantly, each language version of the Treaties is authentic.⁷⁷ By implication, all language versions must convey the same information or message since they are to have the same legal status and legal effects.⁷⁸ Nevertheless, there is more debate than consensus regarding whether the Treaties provide for consistency or coherence.⁷⁹

Highlighting the significance of the discrepancy between consistency and coherence, Koutrakos submits that “the definition of the requirement of consistency is not without problems.”⁸⁰ However, if this requirement is to be applied and monitored or examined in practice, there is need for at least a definition of the applicable standard along with what this would entail in practice.⁸¹ In this regard, this thesis agrees with the view that the requirement of 'consistency' foreseen in the English language version of the Treaties entails more than avoiding legal contradictions and presupposes a quest for synergy and added value between the different

⁷⁵Ibid.

⁷⁶See for example Hillion, fn 12 above; Tietje, C, ‘The Concept of Coherence in the TEU and the CFSP’ (1997) 2 *EFARev* 211; and also Cremona, M, ‘Coherence through Law: What difference will the Treaty of Lisbon make?’ (2008) 3 *HRSS* p 15; Koutrakos, fn 41 above, p 39; Blockmans, S, ‘An Introduction to Political and Legal Aspects of EU Security Policies’ in Casteleiro, A, and Spornbaur, M, (eds.), ‘Security Aspects in EU External Policy’, *EU Working Papers, Law* 2009/01, p 9, available at http://cadmus.eui.eu/bitstream/handle/1814/10288/LAW_2009_01.pdf;jsessionid=CB57C80CE335CE9179AF4FE6E6DB8E5C?sequence=3, accessed 10 September 2010.

⁷⁷Article 55(1) TEU and Article 358 TFEU. This is of course a separate issue from the question of whether this is a legal obligation or a political requirement (see Chapter Two of this thesis at 2.5.1.3.).

⁷⁸See Robertson, fn 21 above. In fact, in Case C-100/84 *Commission v UK* [1985] ECR I169, the ECJ explained that where a comparative examination of the various language versions of an EU legal text does not enable a conclusion to be reached in favour of any of the arguments put forward, then ‘no legal consequences can be based on the terminology used’ (para 16).

⁷⁹Of course, this is not to say that the two concepts are always mutually exclusive (see for example Case C-266/03, *Commission v Luxembourg*, [2005] ECR I-4805, para 60; and Case C-433/03, *Commission v Germany*, [2005] ECR I-6985, para 66, where references were made to both coherence and consistency; also see Khaliq fn 3 above, p 447; Hoebink, P, ‘Coherence and consistency in Europe’s foreign policy’, in Bond (anthology) *Europe in the world: essays on EU Foreign, security and Development Policies* (London: Bond, 2003), 37–43; and in general, Mathisen, G, ‘Consistency and coherence as conditions for justification of Member State measures restricting free movement’ (2010) 47 *CMLRev.*, 1021–48).

⁸⁰Koutrakos, fn 41 above, p 39. Indeed, it has been suggested that it is due to the complexity of the phenomenon of consistency that much of the literature remains at the more general or conceptual level (Hartlapp, M, *et al*, ‘Linking Agenda Setting to Coordination Structures: Bureaucratic Politics inside the European Commission’, (2012) 53 *JEI* 4, 425–441).

⁸¹Robertson, fn 21 above, p 16.

actions of the Union.⁸² This covers both consistency and coherence with the former construed as forming a first degree of the latter.⁸³ Ultimately, although coherence and consistency could have different meanings, the requirement of the Treaties covers both, and is essentially about 'the construction of a united whole'.⁸⁴ This includes both lack of legal contradictions on the one hand, and synergy between the different elements of EU external action policies, on the other hand.⁸⁵ Of course, it can be argued that legal contradictions which would mainly be detected in instruments where they exist, would rarely arise. This is because a requirement would usually be acknowledged in the instruments, even if rhetorically, in anticipation of practice.⁸⁶ As for coherence based on the construction of a united whole *vis-a-vis* synergy between the different elements of EU external action policies, the thesis approaches it as a question that entails the synergy of norms, instruments and institutions in practice, as well as synergy in the sequencing of available policy options in the external projection of EU strategies and policies.⁸⁷ In EU

⁸²Hillion, fn 13 above, p 12.

⁸³Gauttier, P, 'Horizontal coherence and the external competences of the European Union', (2004) 10 *ELJ* 26. This is similar to the distinction between consistency in a narrow sense (absence of contradictions) and consistency in a broad sense (coherence) (see Franklin, C, 'The Burgeoning Principle of Consistency in EU Law' (2011) 30 *YEL* 1 pp 42–85; and also Khaliq, U, 'The external action of the European Union under the Treaty of Lisbon' in Trybus, M, and Rubini, L, (ed.) *The Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham: Edward Elgar, 2012), p 246.

⁸⁴Koutrakos, fn 41 above.

⁸⁵Koutrakos, fn 13 above, p 250; also see Von Elsuwege, P, 'EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance Between Delimitation and Consistency' (2010) 47 *CMLRev.*, 987–1019, p 27.

⁸⁶See the aims of this thesis in section 1.3. below.

⁸⁷See the Sahel Strategy, fn 47 above, p 2; also see Zounmenou, D, 'Is a Military Intervention in Mali a Realistic Option?', Institute of Security Studies (ISS), Pretoria, 25 June 2012, available at

<https://www.issafrica.org/iss-today/is-a-military-intervention-in-mali-a-realistic-option>, accessed 24 November 2015; however, also see Nuttall, S, "Coherence and Consistency" in Hill, C, and Smith, M, (ed.) *International Relations and the European Union* (OUP, 2005) Chapter 5, who makes a distinction between horizontal coherence and institutional coherence. For the purposes of this thesis, the policy options discussed are the core EU external action policies towards SSA namely Trade, Development, Trade, CFSP and the CSDP (see 1.2. above). Indeed, these are the main EU external policies represented in Article 3(5) TFEU on the aims of EU external relations: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. *It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child*, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." [author's emphasis]. Using Moussis's categorisation, these are simply external policies, and are different from internal sectoral policies of the Union which may have external effect (see Moussis, N, *Access to European Union, law, economics, policies*, available at (Rixensart: http://www.europedia.moussis.eu/books/Book_2/, accessed 08 June 2016). However, as

external action parlance, this amounts to horizontal coherence.⁸⁸

Overall, despite the theoretical debate regarding the concepts of 'coherence' and 'consistency', many recent scholarly works in this field of research have generally taken to 'coherence' as a general approach.⁸⁹ This is not simply because most languages refer to the dynamic notion of coherence. Rather, this may not be unrelated to the difficulty the term 'consistency' *prima facie* poses. For example, consistency would usually indicate a zero-sum game. As Wessel notes,

indicated at 1.5. below on research methodology, development policy is at all times the benchmark policy for the investigation of the dynamics of coherence in EU external action towards SSA. The reason for this is further discussed in Chapter Two of this thesis at 2.4.2.

88It is further noteworthy that the issue of coherence in the context of EU external relations law and policies is not monolithic. Rather, it is mainly of two dimensions namely vertical and horizontal coherence. In this regard, it is important to expressly indicate the dimension of coherence which this thesis is concerned with. Vertical coherence governs the interaction between EU policies and the policies of the Member States. This would mainly occur in areas where both the Member States and the EU may act simultaneously in relation to the same policy or subject matter (Cremona, fn 76 above, p 16). In contrast, horizontal coherence governs the interaction between different strands of EU external policy. As mentioned above (at p 5), in examining the requirement of coherence in EU external relations law and EU external action towards SSA, this thesis investigates the extent of the construction of a united whole in this context. The foreign policies of the EU Member States are a crucial part of EU foreign policy. See for example Case C-266/03 *Commission v Luxembourg (Inland Waterways Agreement)* [2005] ECR I-4805, at para 60; Case C-433/03 *Commission v Germany* [2005] ECR I-6985, at para 66; Case C-124/95 *The Queen ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-114, at para 27; Case C-70/94 *Werner v Germany* [1995] ECR I-3189, at para 10; Case C-221/89, *Factortame II* [1991] ECR I-3905, at para 14; Case C-127/87 *Commission v Greece* [1988] ECR 3333, at para 7; Case C-57/86 *Greece v Commission* [1988] ECR 2855, at para 9; Joined Cases C-6/69 and 11/69 *Commission v France* [1969] ECR 523, at para 17; also see Council Decision 94/942/CFSP and Council Regulation (EC) No. 3382/94 [1994] *OJ L367/31* which provide that the two instruments constitute "an integrated system involving, in accordance with their own powers, the Council, the Commission and the Member States" (Article 1 Council Decision 94/942); and European Commission, 'Europe in the World – Some practical proposals for greater coherence, effectiveness and visibility' (2006) COM 278 which indicates that the EU external action is not served only by the EU policies but also the foreign relations of the Member States; also see Hillion, fn 13 above, p 10; and Takman, A, 'External action after the Lisbon Treaty: the case of the EU and the OSCE', *UI Brief* No. 18 (Stockholm: Swedish Institute of International Affairs, 2013), p 2. Moreover, the post-Lisbon EEAS as an EU foreign service coordinates the diplomatic services of the EU Member States all over the world. This renders vertical coherence as much an imperative as horizontal coherence in the construction of a united whole in EU external action. Indeed, see to this effect, European Security Strategy' (ESS), fn 30 above, p 13: "[...] Greater coherence is needed not only among EU instruments but also embracing the external activities of the individual member states." However, this thesis is not concerned with vertical coherence - which would entail addressing the bilateral policies of EU Member States outside the EU framework. Nevertheless, materially, the exclusion of the investigation of vertical coherence from the scope of this thesis does not mean that references are not made to principles and practices relating to vertical coherence where these contribute to addressing any of the questions which the thesis sets to answer (see for example the analysis in Chapters Five (on the CFSP) and Six (on the CSDP) of this thesis). For the relevant EU external policies investigated in this thesis along the lines of horizontal interaction see fn 87 above.

89However, see Von Elsuwege fn 85 above; Franklin, fn 83 above; and also Marangoni, Anne-Claire (2014) *Towards consistency of EU external policies? A case study on the European Commission*, PhD – Thesis, Maastricht: Universitaire Pers Maastricht, all of who have opted for 'consistency'.

concepts of law cannot be more or less consistent – something is either consistent or it is not.⁹⁰ Contrastingly, coherence is not given to a binary choice but is only a matter of degree,⁹¹ and hence a more realistic goal in the context of policy framework analysis.⁹² As mentioned above,⁹³ this thesis follows the same line and adopts 'coherence' as a general approach albeit not to the total exclusion of a mention of 'consistency' from the analysis.

1.4. Aim of this thesis and sub-research questions

As mentioned above, at the core of this thesis is the question of the coherence of EU external action towards SSA especially in the light of the requirement of coherence in EU external relations law. In particular, the thesis seeks to answer the question: to what extent is the Union's external action towards SSA coherent in the light of both the requirement of coherence as strengthened as Lisbon, and the introduction of the HR/VP and the EEAS which are aimed at enhancing the coherence of EU external action? In dealing with this question which borders mainly on horizontal coherence,⁹⁴ the thesis covers two key sub-questions namely: (1) What are the dimensions of the requirement of coherence in EU external relations law that could be considered central to the potential determination of the coherence of EU external action towards SSA,⁹⁵ and what do their theoretical examination reveal regarding the possibility of determining their existence (or lack thereof) with certainty? (2) How does the relevant policy instruments,

⁹⁰Wessel, fn 72 above.

⁹¹Ibid.

⁹²For the difficulties of this approach, see Franklin, fn 83 above; also as mentioned earlier (see fn 76 above), this is not to say that the two concepts are always mutually exclusive.

⁹³See fn 3 above.

⁹⁴See 1.4. above.

⁹⁵As discussed in this thesis, these are two fold: (1) policy coherence for development as explained in Chapter Two of this thesis at 2.5.1.1.2 below, and (2) synergy in the sequencing of available policy options in the external projection of EU strategies and policies as briefly mentioned at 1.3. above, and also explained in Chapter Two of this thesis at 2.5.1.1.2. with special reference to SSA. As mentioned at fn 87 above, the relevant policy options discussed in the context of this thesis are the core EU external action policies towards SSA namely Trade, Development, Trade, CFSP and the CSDP and the benchmark policy in this regard is development policy.

the legal-institutional dynamics and the Mali case study reflect these and the potentials of the post-Lisbon HR/VP and the EEAS to add value to the quest for coherence especially in the particular context of this study?

Overall, the thesis proceeds from an understanding that whilst the study of EU external action and policies towards SSA is prominent in development studies, economics, history, and political science amongst other disciplines,⁹⁶ there is a dearth of exploration of its legal aspects.⁹⁷ This is notwithstanding the utility and significance of the law in the organisation of EU external relations.⁹⁸ To facilitate the discussion necessary to address the topic including the key research question and the sub-research questions, the thesis analyses:

- a) The pertinent background and constitutional principles of EU external relations law, the scope of EU external competence, and the delimitation of competence between the relevant strands of EU foreign policies. The provisions of the Treaties on these are the basic legal frameworks and the legal intricacies that the issue and principle of horizontal coherence revolves around.
- b) The dynamics and dimensions of the requirement of coherence in EU external relations law and their import on the interaction between the core EU external action policies towards SSA namely Trade, Development, Trade, CFSP and the CSDP, as well as on the

⁹⁶In general, the nature of the European integration project has, since its very beginning, been viewed through a number of different prisms (see for example, Khaliq, U, 'Treaty conflict and the European Union, or conflicting perspectives on the European Union?' (2012) 37 *EL Rev* 4, pp 492-503). However, from all indications, there is little or no doubt that European integration is more or less 'integration through law'.

⁹⁷One of the available legal analysis in this area is Martenczuk, fn 26 above. However, this is not specifically concerned with coherence.

⁹⁸See in general Chapter Two of this thesis.

possibility of determining with certainty the existence (or lack thereof) of coherence in practice.

- c) The pertinent historical background of EU external relations with SSA which may more or less continue to hold implications for coherence in EU external action towards the region.
- d) The legal and functional instruments, as well as the institutional dimensions of EU external action and their implications for coherence in EU external action in general, and towards SSA especially in the light of the changes introduced at Lisbon.
- e) A case study of EU external action towards Mali is undertaken to obtain a further insight into the aims of this research.

The relevant Chapters as they relate to these different aspects of the analysis are introduced below.⁹⁹

1.5. Methodology of the Research

The thesis is first and foremost a legal analysis albeit placed squarely within its historical and political contexts. Hence, in answering the research question and sub-research questions set out above, the thesis adopts a law in context approach and embarks on a *legal* analysis of the relevant *legal* provisions, instruments and institutional dimensions of the Union's multifaceted policies towards the region. For this purpose, the thesis concentrates on the four key EU policies

⁹⁹See 1.7. below.

towards SSA namely development policy, trade policy, the CFSP and the CSDP with development policy as the benchmark policy for the investigation of the research question.¹⁰⁰ By and large, in attempting to assess the extent of the coherence of EU external action towards SSA, the analysis broadly covers the relevant norms, institutions and instruments¹⁰¹ of these policies, including the functional deployment of same with special reference to Mali as a case study for the region, especially in the light of the relevant legal provisions.¹⁰² While a comprehensive analysis of all relevant instruments of EU external action in SSA cannot be undertaken within the limited confines of this thesis, a comprehensive analysis of the institutions of external action towards SSA is pertinently provided. This enables the thesis to investigate the added value of the new HR/VP and the EEAS to the quest to enhance, if not ensure,¹⁰³ coherence in EU external action with special reference to SSA.

From a theoretical perspective, the thesis adopts an approach that is analytical and not simply descriptive of the issues discussed. It combines textual and contextual analysis of the requirement of coherence in EU external relations law and the coherence of EU external action towards SSA in practice. Invariably, the analysis draws not only from EU external relations law and international law, but also from the relevant disciplines of development economics, history, political science and strategic studies. Indeed, as discussed in Chapter Two, the limits of the law in the conduct of EU external action, in the light of the constraints of politics, and to some extent, the influence of history, is well recognised.

¹⁰⁰See 1.4. above.

¹⁰¹This is also the categorisation of coherence by Cremona, fn 76 above, p 16, where she also refers to complementarity.

¹⁰²This does not detract from the fluidity that arises from the pragmatic application of law in this context (see the subsequent Chapters of this thesis).

¹⁰³See in general Chapter Two of this thesis, at 2.5.1.

With regards to the more substantive aspects of this thesis namely the relevant principles of EU external relations law, the distinct policies of EU external action towards SSA and the case study on Mali, a legal analysis of the relevant principles and constitutional aspects of EU external action towards SSA is undertaken. This deals with the relevant provisions of the Treaties, the relevant bilateral treaty frameworks and an analysis of the procedural and substantive aspects of the requirement of coherence in EU external relations law and EU external action towards SSA. Furthermore, in investigating the selected key policies of EU external action towards SSA, the thesis necessarily looks at whether there are any rules, procedures or institutional arrangements in any of the four selected policy areas that illustrates a breach of the dimensions of the requirement of coherence investigated in this thesis. This includes the question of any evidence for detrimental effects of any detected incoherence. It also entails an analysis of whether there are any rules, procedures or institutional arrangements, in any of the four selected policy areas that address or attempt to overcome incoherence with other policy areas. The investigation of whether there is incoherence and the extent to which this is already addressed helps the thesis to answer the research question, provide a conclusion, and finally recommend what needs to be done which is not already done to address and overcome any detected incoherence. At all times, it should be borne in mind that the limited focus of the selection of policies and instruments in this thesis is in no way purported to undermine the significance of other policies and instruments not covered. The scope of analysis is necessarily subjected to the word limit requirement.

Apart from wide-ranging academic literature, the thesis uses appropriate official sources of the EU, encompassing treaty law and secondary legislation. It is within these instruments and in their practical application that the rules, procedures and institutions of the distinct policies as

they relate to coherence are analysed. However, the thesis does not consider only 'hard law' but also case law and 'soft law' sources such as European Commission Communications, Council Conclusions, and European Council guidelines, other policy and institutional documents, as well as reports, monographs, edited collections, speeches, and journal articles. Although the soft law documents constitute a 'grey zone between law and politics',¹⁰⁴ they are useful for the purposes of this thesis as they elaborate on the scope and direction of EU activities relating to the issues under consideration. Moreover, as they are frequently used by the EU, their inclusion is necessary to provide an analysis as comprehensive as possible for the purposes of this thesis. Although interviews were initially planned in anticipation of potential gaps on open points, this was eventually found not to be indispensable for the purposes of answering the research questions. Indeed, not only are myriad recent reports and materials from a wide range of sources available, some of these which are pertinently studied in this thesis are based on interviews.¹⁰⁵ Furthermore, apart from institutional practice, the other relevant policy dynamics such as norms and instruments are completely examinable through desk research. Moreover, of no less significance is a combination of fiscal challenges and insecurity in Mali.¹⁰⁶

1.6. Research limitations

Apart from a lack of primary interviews, there are limitations to this study that are worth highlighting. For example, as is often the case with reports, "[...] we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns;

¹⁰⁴Malanczuk, P, *Akehurst's Modern Introduction to International Law* (7th rev. ed.), (London: Routledge, 2000), p, 54.

¹⁰⁵For an example of a pertinent and recent one see Davis, L, Reform or Business as Usual? EU Security Provision in Complex Contexts: Mali (2015) 29 *Global Society* 2, 260-279.

¹⁰⁶See for example Caleb Weiss, 'Al Qaeda has launched more than 100 attacks in West Africa in 2016', 08 June 2016, available at <http://www.longwarjournal.org/archives/2016/06/over-100-al-qaeda-attacks-in-west-africa-since-beginning-of-the-year.php>, accessed 10 June 2016.

the ones we don't know we don't know.”¹⁰⁷ Indeed, in the specific case of the EU, there is an understanding that the conduct of its external relations is undoubtedly dependent upon a web of legal rules, political realities and economic conditions of both national and supranational nature whose influence cannot always be accurately ascertained.¹⁰⁸ Significantly, these play into the institutional dimension of EU external action, itself complicated not only since it may be said to be the result of the cumulative effect of both internal and external measures, but also because policy formulation and decision-making may take place within different frameworks for external action. The end result is a certain level of 'institutional uncertainty'¹⁰⁹ that makes it difficult to conclude the institutional dimension of policies under investigation with certainty.¹¹⁰ These may all be more the case in the context of the unarguably complex dynamics of EU external relations with SSA.¹¹¹ Suffice it to state that the complexity of the historical, political

107See U.S. Department of Defense. DoD News Briefing — Secretary Rumsfeld and Gen. Myers, 12 Feb 2002, available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>, accessed 16th May 2015.

108Koutrakos, fn 41 above, p 1; also see Mold, A, and Page, S, 'The Evolution of EU Development Policy – Enlargement and a Changing World' in Mold, A, (ed.) *EU Development Policy in a Changing World: Challenges for the 21st Century* (Amsterdam University Press, 2007), p 12 on the complexity of the interaction between policies; with specific regards to the legal dimension see for example the Introduction to Koutrakos, P, *EU International Relations Law* (2nd edn), where he cited Anthony Aust: “anything to do with the European Communities is complex and this is particularly so for the law governing their external relations”; and Holdgaard, R, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (The Hague: Kluwer Law International, 2008), p 2, where he makes reference to how EU external relations law is regarded as incomprehensible and impenetrable by traditional legal standards; and also Peers, S, 'EC Frameworks of International Relations: Co-operation, Partnership and Association' in Dashwood and Hillion, fn 24 above, p 160 where he makes reference to the legal complexities of EU external relations; and also in general De Witte, B, 'Too much constitutional law in the European Union's Foreign Relations?', in Cremona and De Witte, fn 3 above, p 3 – 16; and also Wessel, R, 'The Legal Dimension of EU Foreign Policy' in Aarstad, A, K, *et al* (Eds.), *Handbook of European Foreign Policy* (London: Sage, 2015), Chapter 21.

109Aggarwal, V, and Forgaty, E, 'Between Regionalism and Globalism: European Union Interregional Trade Strategies' in Aggarwal, V, and Forgaty, E, (ed.), *EU Trade Strategies: Between Regionalism and Globalism* (London: Palgrave Macmillan, 2004) p 30; also see Vanhoonacker, S, 'The Institutional Framework' in Hill and Smith, fn 87 above, p 68.

110See for example, Aggarwal and Forgaty, fn 109 above, p 30 where they submit that it can be difficult to define a coherent set of procedure and processes whereby broad EU trade policy is made.

111See for example Martenczunk, fn 26 above where he writes on the institutional and procedural complexity of development cooperation in this context; and Ravenhill, J, 'Back to the Nest? Europe's Relations with the African, Caribbean and Pacific Group of Countries' in Aggarwal and Forgaty, fn 109 above, p 121 where he writes on the complexity of the reality beyond the letter of one of the successive regimes of association signed in the context of EU external action towards SSA; also see Mangala who submits that while different theoretical frameworks may offer insight into the fundamental dynamics driving the relationship, no individual theoretical framework can adequately explain the totality of EU-Africa relations which is also built on a dense and complex web of institutional, economic, political, social and cultural ties (Mangala, J, 'Africa-EU Strategic Partnership: Historical

and legal relations between EU and SAA cannot be over-emphasised and indeed cannot be fully illustrated within the limited confines of this thesis. In this regard, while the country case study of Mali makes for manageability, the attendant limitations cannot be denied in so far as there are as much differences as similarities in the countries of SSA.¹¹² Overall, the thesis has been completed on the basis of available information, and it is possible that there are inaccessible internal practices and documents which might illustrate factors that could shed more light on the issues under consideration, but are classified. This is an acknowledgement of data limitations.

However, beyond data limitations, it is worthy to note that the examination of coherence in this thesis,¹¹³ does not in any way imply a commitment to an assessment of end results. The latter is outside the purview of legal research, and it may not be out of place for policy analysts with interest in end results to consider the study too legal and institutional in approach.

In any event, in so far as the legal and institutional changes made at Lisbon with a view to enhancing (or ensuring) coherence in EU external action are still nascent, any appraisal of their further potential impacts at this stage somewhat remains tentative. Moreover, as recently explained by some scholars of EU studies:

“Europe is in a constant state of flux. European politics, economics, law and indeed European societies are changing rapidly. The European Union itself is in a continuous situation of adaptation. New challenges and new requirements arise

Background, Institutional Architecture, and Theoretical Frameworks' in Mangala, J, (ed.), *Europe and the European Union: A Strategic Partnership* (Basingstoke: Palgrave Macmillan, 2013), p 37.

¹¹²The EU is not oblivious to this and have embraced differentiation in its approach, especially according to the level of development of the countries of the region (see Chapter Three of this thesis especially at 3.5.2).

¹¹³Namely, norms, instruments and institutions (see 1.5. above).

continually, both internally and externally.’’¹¹⁴

1.7. The Thesis Outline

The thesis chapter structure reflects a sequential presentation of arguments that address the research questions. It is divided into eight chapters including this general introduction and a general conclusion.

This Chapter One is the introductory chapter. It provides a general overview of the thesis, the research methodology adopted and the overall structure of the thesis.

Chapter Two is a foundational Chapter which aims to provide a historical and contextual background for the overall analysis. In doing this, the Chapter provides a pertinent overview of the relevant constitutional principles of EU external relations law and the implications of these for the coherence of EU external action in general and towards SSA in particular. Furthermore, the Chapter provides a brief historical overview of the evolution of EU's special relations with SSA, including the background to the framework agreements of EU external action towards SSA. This is important both as a pertinent background for the discussion of the policies of EU external action towards SSA, and as an effective introduction for the historical and political

¹¹⁴Blurb for Pelkmans, J, *et al* (eds.) *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analysis* (European Interuniversity Press, 2008) as found in Zalewska, M, and Gstrein, O, J, 'National Parliaments and their Role in European Integration: The EU's Democratic Deficit in Times of Economic Hardship and Political Insecurity' College of Europe, *Bruges Political Research Papers* No. 28, 2013; also see Khaliq, U, 'The Treaty of Lisbon and the Future of EU Foreign Policy' in Trybus and Rubini, fn 83 above where he writes with specific regards to Lisbon: '[...] after Lisbon, it is obvious that the level of sophistication and the nature of cooperation has moved on. It is an evolutionary process, and Lisbon was never going to be a foreign policy revolution.' However, for recent threats to European integration see for example Sykes, S, 'Now French voters call for FREXIT after Germany face demands for EU referendum', available at <http://www.express.co.uk/news/world/654175/French-voters-demand-Frexit-EU-referendum-Germany-UK-Brexit?ref=yfp>, accessed 26 March, 2016. Indeed, as at the date of the conclusion of this thesis, the referendum had been concluded and the result is in favour of the United Kingdom's exit from the EU.

context which the analysis is placed on. Accordingly, it explores the historical relations – or lack thereof - between EU Member States and the countries of SSA with a view to highlighting the legacies that may or may not continue to hold implications for the coherence of EU policies, even against the background of the Lisbon changes. Equally, the Chapter distills the objectives of EU external action in general, and towards SSA in particular, and also introduces the benchmark policy for the examination of the issues that surround the assessment and determination of coherence in the context of this thesis. Furthermore, it traces the evolutionary background of the requirement of coherence in EU external relations law and practice, and also analyses the legal, political and institutional framework of this requirement as well as their import on the main issues under consideration. Overall, although the legal framework has to be placed in its historical context, the emphasis is especially on the post-Lisbon legal and institutional framework for EU external action.

Chapter Three provides an analysis of the first core EU policy towards SSA, namely development cooperation policy. In doing this, the Chapter analyses the legal basis for EU development policy within the EU legal order, and also analyses the distinct legal instruments of EU development policy with special reference to SSA. Furthermore, it pertinently investigates the institutional dimension of EU development policy including in relation to policy formulation, implementation and enforcement. The role of the HR/VP and the EEAS in development policy is also discussed. Finally, building on the theoretical framework, the Chapter specifically discusses the dimensions of this policy towards Mali as a case study.

Chapter Four provides analysis of EU Trade policy towards SSA. In doing this, the Chapter follows the structure of Chapter Three. Hence, it analyses the legal basis for EU trade policy

within the EU legal order, and also analyses the distinct legal instruments of EU trade policy with special reference to SSA. Furthermore, it investigates the institutional dimension of EU trade policy including in relation to policy formulation, implementation and enforcement. The role – or lack thereof - of the HR/VP and the EEAS in trade policy is also discussed. Finally, the Chapter discusses EU trade policy towards SSA with a view to determining coherence using Mali as a case study.

Chapter Five provides the analysis of the CFSP. In the light of the indefinite scope of this framework, the analysis centres on a particular aspect of the CFSP namely diplomacy especially as it relates to security. The discussion in this Chapter follows the structure in Chapters Three and Four. Essentially, it analyses the legal basis for the CFSP within the EU legal order, and also analyses the distinct legal nature and instruments of the CFSP with special reference to SSA. Furthermore, it investigates the institutional dimension of the CFSP including in relation to policy formulation, implementation and enforcement. The role of the HR/VP and the EEAS in the CFSP is also discussed. Finally, the Chapter places a special focus on CFSP in Mali with a view to determining coherence.

Chapter Six provides analysis of the CSDP. The discussion in this Chapter also follows the structure in Chapters Three, Four and Five. It analyses the legal basis for the CSDP within the EU legal order, and also analyses the distinct legal nature and instruments of the CSDP with special reference to SSA. Furthermore, it investigates the institutional dimension of the CSDP including in relation to policy formulation, implementation and enforcement. The role of the HR/VP and the EEAS in the CSDP is also discussed. Finally, the Chapter places a special focus on the CSDP in Mali in order to enable the assessment of coherence.

Chapter Seven discusses a key specific instrument aimed at enhancing coherence in EU external relations with SSA, namely the Joint Africa-EU Strategy. The purpose of this Chapter is to discuss whether these have proven or potentially will prove a veritable instrument for enhancing coherence in EU external relations with SSA using Mali as a case study.

Chapter Eight summarises the main issues at the heart of the matter as drawn from the analysis and strings of argument in the previous Chapters in order to arrive at a conclusion and proffer recommendations. In doing this, the Chapter draws from the theoretical examination of the relevant issues and the Mali case study and highlights the complexity around the issues including with regards to the determination of the existence of coherence or lack thereof and with regards to the determination of the potentials of the HR/VP and the EEAS to add value to the quest for coherence with special reference to EU external action towards SSA. Finally, it proffers recommendations based on the conclusions.

Chapter Two

2.0. Contextualising the requirement of coherence in EU external relations law and EU external action towards SSA

2.1. Introduction

The previous Chapter provided a general introduction to this thesis. The present Chapter contextualises the requirement of coherence in EU external relations law and its essence in EU external action towards SSA. Although context was touched upon in the introduction,¹ this was merely synoptic and was only provided as one of the grounds of justification for embarking on this thesis. Similarly, the concept of coherence was only discussed briefly in that Chapter to satisfy the need for a working definition of coherence and to clarify the dimension of coherence the thesis is concerned with.² In contrast, the present Chapter places the requirement of coherence within the broad structural, historical and legal context of EU external action with special reference to SSA. In doing this, the Chapter at all times traces the historical evolution of the requirement of coherence in EU external action including with special reference to SSA. This is to enable recognition of some kind of continuity in its development. The Chapter is both an integral aspect of this study and a pivotal background which the whole thesis is based on.

The Chapter is divided into four sections. Section one provides a brief discussion of the origins of EU external relations law and policies including with special reference to SSA. This is followed by an analysis of the pertinent constitutional principles of EU external relations law which the interaction between EU external action policies and the requirement of coherence revolve around. These include a discussion of the settled and yet pertinent question of the international legal personality of the Union, and also an analysis of the scope of EU external

¹See Chapter One at 1.3.

²See Chapter One at 1.2.

competences as they relate to the coherence of EU external action. Where necessary a special highlight is placed on the Lisbon changes. The subsequent Section provides an analysis of EU external objectives in general and towards SSA in particular especially in the light of the Lisbon changes. This is followed by a discussion of the legal, political and institutional frameworks for coherence in EU external action albeit with special reference to SSA.

The Chapter submits that the EU is not only committed to the coherence of its external action in general, and towards SSA in particular, but also to policy coherence for development which requires all other external policies of the EU to be in harmony with the objectives of development policy towards the region. However, it argues that although these are clearly illustrated by the strengthening of the requirement of coherence at Lisbon, the Union's legal commitment in this regard are in general short of enforceable external obligations. Furthermore, it highlights the legal and political limitations on the potentially enforceable internal obligation on EU institutions. Against this background, it stresses that the coherence of EU external action towards SSA would invariably not rest solely on the High Representative for the Common Foreign Policy and the Vice President of the Commission (HR/VP) and the European External Action Service (EEAS) which were established for coherence. This is because these are only bridging institutions that would have to depend on the political will of the relevant traditional EU institutions, and perhaps, sometimes the Member States to enhance coherence. Overall, it acknowledges that the limits of the law and the constraints of politics in the field of EU external action would generally mean that the Lisbon legal and institutional changes portend as much potentials as challenges for coherence in EU external action in general, and policy coherence for development in particular especially in the context of EU external action towards SSA. Nevertheless, the Chapter concludes that these may only be determined by a contextual

investigation.

2.2. Internal market: why external relations and objectives?

European integration began as a direct reaction to World War II (WWII).³ Evolutionarily, the desire to reconstruct a Europe prostrate from the ruins of war⁴ was marked by many different levels of development towards the ultimate aim of integration. However, it is generally accepted that the first major step in European integration was the establishment of the European Coal and Steel Community (ECSC).⁵ Its aim was the establishment of a common market for coal and steel in order to take these products needed to make weapons away from national governments and hence make another war impossible.⁶ The ECSC was subsequently followed by the European Atomic Energy Community (Euratom),⁷ and the European Economic Community (EEC)⁸ created by the Treaty of Rome. The expressed aim of this last Community was the establishment of a common market (also known as the 'internal market' or 'single market' as it later came to be known when integration moved on from a mere customs union).⁹ Essentially, the Community started its life as a customs union - the most advanced form of trade integration

3Trybus, M, *European Union Law and Defence Integration* (Oxford: Hart, 2005), p 11; also see the Schuman Declaration – 9 May 1950, available at http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm, accessed February 02, 2015.

4Okigbo, P, C, N, *Africa and the Common Market* (London: Longman, 1967), p 2.

5Treaty establishing the European Coal and Steel Community (1951), available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding>, accessed 30 August 2010. Also known as the Treaty of Paris, the ECSC which was concluded for a fixed period of 50 years expired by its terms on 23 July 2002.

6See for example Trybus, fn 3 above, p 19 where he submits that “There is no modern warfare without weapons made of steel made with iron ore and coal”. In the particular context of post-war Europe, it was considered that another war between France and Germany could only be diminished by effective control over their coal and steel industries (Wessel, R, ‘Towards a United Europe? A Legal Perspective on European Institutionalisation and Integration’ in Wilde, J, and Wiberg, H, (eds.) *Organised Anarchy in Europe: The Role of Intergovernmental Organisations* (London: Taurus, 1996), p 47).

7Treaty establishing the European Atomic Energy Community (1957), available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding>, accessed on August 30 2010. Unlike the ECSC, this Treaty which established a common nuclear market “to ensure that all users in the [Union] receive a regular and equitable supply of ores and nuclear fuel” continues to exist, albeit in a somewhat semi-detached manner from the EU (see Council Decision of 12 February 2008 establishing Statutes for the Euratom Supply Agency [2008] *OJ L* 41/15).

8Treaty establishing the European Economic Community <http://eur-lex.europa.eu/en/treaties/index.htm#founding>, accessed 30 August 2010.

9See fn 11 below.

with the potentials for advancing to a common market with all the economic and political implications of that advancement.¹⁰ This was also the precursor of the EU as it is presently known, albeit not without going through several amendments. Indeed, the Treaty of Rome was successively amended by the Single European Act (SEA),¹¹ the Treaty of Maastricht¹² or TEU (which established the European Union for the first time), the Treaty of Amsterdam,¹³ and the Treaty of Nice.¹⁴ This last Treaty is the immediate predecessor to the Lisbon Treaty¹⁵ which categorised the Treaties as TEU and the TFEU.¹⁶

If the original core aim of the EU - at least as was initially represented through the Communities¹⁷ - was the establishment of an 'internal' common market, then the need for the evolution of EU external relations law and policies is worth exploring. In this regard, the following are the generally accepted key reasons for the evolution of the external dimension of

¹⁰See Okigbo, fn 4 above, p 22; and also p 18 – 23 inclusive where he also discussed the different types of economic integration including Preferential Area and Free Trade Area which do not have any prospects of further economic or political integration).

¹¹Single European Act, 17 February 1986 [1987] *OJ L*169. The SEA was the legal channel for the transcendence of the Community from a mere customs union without internal barriers to trade, to an 'internal market' or 'single market' with complete totality of freedom of economic activity. For a detailed analysis of the SEA and the change to 'single market' see Lonbay, J, 'The Single European Act' (1998) 11 *B.C. Int'l & Comp. L. Rev.* 1, p 31.

¹²Maastricht Treaty, TEU or Union Treaty: Treaty on European Union, 7 February 1992 [1992] *OJ C*191/1. This Treaty renamed the EEC European Community (EC).

¹³Treaty of Amsterdam Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997 [1997] *OJ C*340/1.

¹⁴Treaty of Nice Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 26 February 2001 [2001] *OJ C*80/1.

¹⁵The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] *OJ C*306/01. It is noteworthy that prior to Lisbon, there was a Treaty Establishing a Constitution for Europe, Rome, 29 October 2004 [2004] *OJ C*310/1. However, this treaty did not enter into force.

¹⁶See the Consolidated versions of the Treaty on European Union (hereinafter TEU) and the Treaty on the Functioning of the European Union (hereinafter TFEU), 2010/C 83/01 [2010] *OJ C*83/01). However, for recent threats to European integration see for example Sykes, S, 'Now French voters call for FREXIT after Germany face demands for EU referendum', *Express*, 23 March 2016, available at <http://www.express.co.uk/news/world/654175/French-voters-demand-Frexit-EU-referendum-Germany-UK-Brexit?ref=yfp>, accessed 26 March, 2016, where he also covers the topical BREXIT EU Referendum.

¹⁷The European Communities were the ECSC, Euratom and the EEC (see fns 5, 7 and 8 above). They were all distinct legal entities but together became known as the European Communities following the merging of their different institutions by the Merger Treaty of 1965.

the law and policies of the EU.¹⁸ Bearing in mind that the fields of EU external relations law and policies have evolved with the EU, these are better understood as the initial motivations only.¹⁹

2.2.1. Protection of the internal market.²⁰

One of the reasons furnished for the evolution of the external dimension of the law and policies of the EU is the need for the external protection of the developing internal market based on a uniform measure. The main consideration in this regard is that an external policy is a necessary complement for the internal dimension in order to protect the attainment of the integration process and to promote its objectives.²¹ The functional policy aimed at addressing this was the Common Commercial Policy (CCP).²² From the earliest beginning, the ex-Community could by virtue of the CCP²³ regulate commercial policy relations. This it could do by both unilateral measures concerning imports and exports (autonomous commercial policy), and by agreements with third countries (conventional commercial policy).²⁴ In one of its earliest cases,²⁵ the Court of Justice of the European Union (hereafter the ECJ)²⁶ held that the CCP was conceived “in the

18Kapteyn, P, J, G, and Verloren van Themaat, P, *Introduction to the Law of the European Communities* (London: Kluwer Law, 3rd edn.) p 1253 - 1254.

19This may be trite but is still worthy to be mentioned (indeed, see the recent Case C-377/12 *Commission v Council* [2014] Judgment of the Court (Grand Chamber) of 11 June 2014, at paras 24, 41-42). The distinct historical and evolutionary backgrounds of the different policies are pertinently discussed in the relevant Chapters of this thesis (for the recent use of this approach see for example, Jan Kuijper, P, *et al*, *The Law of EU External Relations; Cases, Materials, and Commentary on the EU as an International Legal Actor* (OUP, 2013)).

20Kapteyn and Verloren van Themaat, fn 18 above, p 1253.

21Kapteyn and Verloren van Themaat, fn 18 above, p 1253.

22Article 207 TFEU (ex-Article 133 EC); also see Nugent, *The Government and Politics of the European Union* (Houndsmills: Palgrave, 2006), p 483, who notes that ‘the unified internal market would not be possible’ without the CCP; and Bretherton, C, and Vogler, J, *The European Union as a Global Actor*. (London: Routledge, 1999), p 47.

23Originally Article 113 Treaty of Rome.

24See Case 8/73 *Hauptzollamt Bremerhaven v Massey Ferguson GmbH* [1973] ECR 897 at para 4; also see Kapteyn and Verloren van Themaat, fn 18 above, p 1275.

25*Opinion 1/75 OECD Understanding on a Local Cost Standard* [1975] ECR 01355, at para 1363.

26By virtue of the Treaty of Lisbon, the EU institution formally known as the European Court of Justice is now ‘the Court of Justice of the European Union’. Although the acronym for the new name of the Court would be CJEU,

context of the common market, for the defence of the common interests of the [EU].”²⁷

However, it can be argued that the EU did not sleep on the potential impact of the protection of the common market and the defence of the common interests of the EU to the rest of the world as the next objective illustrates.

2.2.2. Post-common market responsibility

A second reason proffered for the evolution of EU external relation and the law regulating it revolves around what is perceived as the Union's responsibility for the major effect of its common market on the world economy. For example, it is suggested that the EU felt a heavy responsibility for the functioning of the international economic system.²⁸ The key reference for this view is the Union's objective of contributing to a harmonious development of world trade and to the progressive abolition of restrictions on international trade.²⁹ Indeed, the EU has well been a relentless generator of strategies and proposals for framework agreements in terms of the international political economy.³⁰ However, whether these have achieved the expressed aims is debatable.³¹ This is not different in the context of EU external action towards SSA where

for ease of reference, this thesis prefers to use ECJ which is the acronym for the previous name of the Court namely the European Court of Justice. Indeed, Arnall explains that it is likely that the term 'European Court of Justice' will continue to be used (Arnall, A, 'The European Court of Justice after Lisbon' in Trybus, M, and Rubini, L, (ed.) *The Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham: Edward Elgar, 2012), p 35.

²⁷*Opinion 1/75*, fn 25 above, at 1363 – 1364.

²⁸Kapteyn and Verloren van Themaat, fn 18 above, p 1254.

²⁹Article 206 TFEU (ex-Article 131 EC, and originally article 110 Treaty of Rome). This is considered evidence that the founding fathers of the EU were conscious of this responsibility from the very beginning (Kapteyn and Verloren van Themaat, fn 18 above, p 1254).

³⁰Hill, C, and Smith, M, *International Relations and the European Union* (OUP, 2005), p 12.

³¹See for example Bartels, L, 'The Trade and Development Policy of the European Union', (2007) 18 *EJIL* 4, 715-716 (hereinafter Bartels (a)) (reprinted in Cremona, M, (ed.), *Developments in EU External Relations Law* (OUP, 2008) p 128) (hereinafter Bartels (b)); and Brenton, P, and Manchin, M, 'Making EU trade agreements work: the role of rules of origin' (2003) 26 *WE* 5, pp 755-69; also see Panagariya, A, 'EU preferential trade arrangements and developing countries' (2002) 25 *The World Economy* 10, p 1415-32; and see in general Lister, M, *The European Community and the Developing World* (Aldershot: Avebury, 1988; Twitchet, C, *Europe and Africa: from association to Partnership*, (Hants: Saxon House, 1978); Zartman, W, *The Politics of Trade Negotiations between Africa and the European Community* (Princeton University Press, 1971); Brown, W, *The European Union and Africa: The Restructuring of North -South Relations* (London: I.B. Taurus, 2002).

opinions may differ on both the prospects and challenges to the achievement of the said objectives.³² Significantly, these objectives are often tied to development policy in EU external action towards SSA where development is arguably at the heart of the EU's engagement.³³

2.2.3. Political objectives

Another reason proffered for the evolution of EU external action concern political objectives. The crux of this point is that European integration has since its earliest beginnings also had political objectives which were expressed along with other objectives in the first paragraph of the preamble of the Treaty of Rome³⁴ Indeed, if the reason behind the establishment of the first Treaty namely the ECSC³⁵ is anything to go by, it is arguable that the communities³⁶ were only a 'basis' for a broader project,³⁷ if not first and foremost a peace project.³⁸ This should constitute

32Ibid.

33Ibid.; also see 2.2.4. below; and Chapter Three of this thesis.

34 Kapteyn and Verloren van Themaat, fn 18 above, p 1254.

35See p 2 above.

36See fn 16 above.

37See the 5th paragraph of the Preamble to the ECSC: "...to create, by establishing an economic Community, *the basis for a broader and deeper Community ...*" [emphasis added]; also see Lonbay, fn 11 above, p 33 where he indicates that "the founding fathers of the Community envisaged a "spill-over" effect to political cooperation; and in general Bebr, G, 'The European Coal and Steel Community: a Political and Legal Innovation' (1953) 63 *YL Rev* 1; Stefanou, C, and Xanthaki, H, *A legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome*, (Aldershot: Ashgate, 1997), p 177, where they note that political scientists have always stressed the importance of the Treaty of Rome as an open-ended political document rather than an economic agreement; Cameron, F, 'The EU as a Global Actor: Far from Pushing its Political Weight Around' in Rhodes, C, (eds.) *The European Union in the World Community* (Boulder: Lynne Rienner, 1998), p 20; and Hallstein, W, *United Europe, Challenge and Opportunity* (Harvard University Press, 1962), especially pp 40-41. On the importance of the text of preambles, see Kelsen, H, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (New York: Frederick A. Praeger, 1964), p 3, who opines that it is usual to determine the purposes of an international organisation in the preamble of the treaty by which the organisation is constituted; with specific regards to the EU, see Arnall, A, 'The European Court and judicial objectivity: a reply to Professor Hartley', (1996) *LQR* 411 where he identifies 'preamble to the Treaty' as one of the sources of guidance which the ECJ resorts to in seeking to identify the aims of a provision.

38See The Schuman Declaration, fn 3 above. Indeed, the ECSC – the very first of the Treaties - solemnly declared in the 1st paragraph of its Preamble that "world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it." It further emphasised in the 2nd paragraph of the preamble that "the contribution which an organised and vital Europe can make to civilisation is indispensable to the maintenance of peaceful relations"; also see Kronenbeger, V, and Wouters, J, *The EU and Conflict Prevention: Policy and Legal Aspects* (Cambridge University Press, 2004), p xvii, where the EU is said to be first and foremost a peace project; and Pinder, J, and Usherwood, S, *The European Union: a very short introduction* (OUP, 2007).

little or no surprise. The idea of ‘peace through commerce’ or the restraining effect of economic ties is arguably well recognised in international law.³⁹

Essentially, it will not be completely correct to regard the recent direct references to the ‘preservation and strengthening of peace and security’ in the preambles of both the TEU and TFEU as a matter of firsts.⁴⁰ These were not occasioned solely by the recent developments in EU law and European integration. Quite specifically, they were not occasioned by the development of the CFSP⁴¹ which is generally accepted as the legal embodiment of EU political objectives. With regards to the external dimension, a point has been made that the emergence of the Union as a political actor on the international scene was also externally motivated.⁴² In particular, it is suggested that there were expectations from both European political elites and third countries that the EU would assume an international political role concomitant to its economic strength.⁴³

In any event, it is well known that the possibility of a common political stance was started in the context of an informal European Political Cooperation (EPC) in 1970 – a couple of years after the Treaty of Rome. The EPC was accepted as a pure intergovernmental arrangement between the Member States to be conducted outside the integration process under the Treaty of Rome.⁴⁴ Significantly, it was at this stage that ‘coherence’ was first introduced as a value worthy

39Or international relations (for example, see in general, Kant, I, *Perpetual Peace and Other Essays*, Translated by Humphrey, T, (Indianapolis: Hackett, 1992); and for a recent example of the invocation of this idea see in general, Clinton, W, ‘National Security Strategy of Engagement and Enlargement’ (Washington DC: White House, 1996).

40See specifically the 8th and 11th paragraphs of the Preamble to the TFEU and TEU respectively.

41Coupled with the CSDP as its integral part.

42Koutrakos, P, *EU International Relations Law* (Oxford: Hart, 2006), p 415.

43Ibid.; however see the reference to world peace in the 1st paragraph of the Preamble to the ECSC cited in fn 38 above.

44See for example, Denza, E, *The Intergovernmental Pillars of the Union*, (OUP, 2002) Chapter Two; and Macleod, I, *et al*, *The External Relations of the European Communities* (Oxford: Clarendon Place, 1996), p 411.

of pursuit in EU external action.⁴⁵ The Member States desired a distinction between the nascent informal intergovernmental EPC foreign policy, and the less political economic external relations of the ex-Community under the Treaty of Rome. The recognition of coherence as a value was necessitated by the need for coherent interaction between these two dimensions of EU foreign policy. The EPC eventually gained ‘Treaty status’ by virtue of the SEA, and morphed into the CFSP at Maastricht.⁴⁶ Nonetheless, at all times in the course of their evolution, the political objectives or foreign and security policies (as they are contemporarily known) have remained legally and procedurally separated from other EU external policies. Undoubtedly, this legal and procedural duality is mainly, even if not solely, behind the issue of coherence in EU external action. This is more so in EU external action towards SSA which traverses these different strands of EU external policy. Significantly, SSA region is where EU external action, and perhaps the issue of coherence, began to evolve.⁴⁷

2.2.4. SSA associates to the internal market: at the fore of EU external action

As explained earlier, EU relations with SSA is deeply rooted in the history of European integration.⁴⁸ This is by no means surprising due to the long historical relationship between Europe and SSA prior to the former's integration.⁴⁹ Separated only by the Straits of Gibraltar,

⁴⁵See 2.3. below.

⁴⁶See 2.4. below.

⁴⁷Of course, that it practically began here does not mean to say that the region is the sole reason for the evolution of EU external relations (see 2.2.4.2. below especially p 12).

⁴⁸See Chapter One at 1.0.

⁴⁹For a general historical discussion on Europe's relations with SSA see for example, Roberts, J, *The Pelican History of the World* (Harmondsworth: Penguin, 1980); Falola, T, *Key Events in African History: A Reference Guide* (Westport: Greenwood, 2002); Rouvez, A, *Disconsolate Empires* (Lanham: University Press of America, 1994); Wilson, H, *The Imperial Experience in Sub-Saharan Africa Since 1870* (OUP, 1977), p vii); Holland, T, *Millennium* (London: Little Brown, 2008); Wesseling, H, *Imperialism and Colonialism: Essays on the History of European Expansion* (London: Greenwood, 1997); Olson, J, & Shadle, R, (ed.) *Historical Dictionary of European Imperialism*, (NY: Greenwood Press, 1991).

the continents of Africa and Europe are close neighbours⁵⁰ with interactions dating back to centuries.⁵¹ Indeed, even the Schuman Declaration⁵² which began the European integration project persuaded that “with increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent”. Arguably, this would mainly be with reference to SSA, at least initially. Indeed, all the above objectives which are explained as the initial motivations for the evolution of EU external relations law and policies could be traced back to the special and historical relations between Europe and SSA region. This sub-section is important for this, and also for another reason namely, to contribute to an understanding of the 'historical challenge' facing the EU in its quest to achieve coherence in the present and future dynamics of EU external action towards SSA especially if not addressed.⁵³ Having said that, it is noteworthy that an extensive historical account is outside the scope of this thesis.⁵⁴ For the purposes of this thesis and this sub-section, it suffices to shed light on the pertinent historical developments which are relevant to the matter at hand.

2.2.4.1. SSA and Association under Part IV of the Treaty of Rome

If the background to EU external relations with SSA is the pre-integration historical relations

508 Miles is popularised as the shortest distance between Europe and Africa (see for example <http://www.forbes.com/sites/mfonobongnsehe/2011/09/03/rock-star-bob-geldof-raises-200-million-to-invest-in-africa/>, accessed 01 April 2014). It follows that there are different degrees of proximity between the different regions of Africa and the European continent (for example, see the ENP discussed in Section 1.0 above).

51See fn 49 above.

52See fn 3 above.

53As the European Commission posits, the Cotonou Agreement (i.e. the contemporary dimension of EU external relations with SSA) has to be understood in the context of colonisation (see the European Commission Document ‘The Cotonou Agreement’, Brussels 2009, DV1, available at ec.europa.eu/development/icenter/.../cotonou_agreement_20091009.ppt, accessed 29 December 2010). In the same vein, the House of Lords also considers history important in understanding EU external relations law and policies towards SSA (see for example House of Lords European Union Committee, Thirty-Fourth Report of Session 2005 – 06 (Vol I: Report), *The EU and Africa: Towards a Strategic Partnership* (London: The Stationery Office, 2006). However, it is noteworthy that this sub-section, is not concerned with what is commonly known as the familiar historical themes of “Gold, Glory, and the Gospel” (for that see author's cited at fn 49 above).

54Ibid.

between the relevant ex-colonial EU Member States and SSA,⁵⁵ it was France which brought the issue of the former to the negotiation for the Treaty of Rome. Indeed, out of the Six Founding Member States, only France had the deepest and the most relevant colonial experience with SSA, including Mali the country of case study in this thesis.⁵⁶ Luxembourg had no colonial experience, while the Netherlands, Germany and Italy had what could be regarded as limited colonial experiences.⁵⁷ On its part, Belgium had a relevant colonial experience⁵⁸ albeit not as expansive as the experience of France in the region. France's interests in the region were extensive and included trade, development aid and political and military aid all under the French policy of assimilation.⁵⁹ In general, France's 'familial' relations with its former territories in SSA is well known and so strong⁶⁰ that it has even been suggested that France tethered between

55Belgium, France, Portugal and the United Kingdom were the main colonial powers in Sub-Saharan Africa (see for example Rouvez, fn 49 above). At the lower rung of the ladder, Germany, Spain and Italy, also have a colonial past in the region although their presence and the resulting ties were not so lasting. Finally, there are the other EU countries (the Netherlands, the Nordic countries and the Central and Eastern European countries) with no colonial experience whatsoever in SSA. Indeed, some of the Central and Eastern European Countries were not independent at the time of colonialism. This is also the case with Luxembourg, which did not exist as an independent entity at the time of the colonial race. It follows that not all EU Member States have historical African policies. In general, while some of the new EU Member States have developed some national policies in SSA, these are mainly development aid related.

56Then known as French Sudan and a part of what was known as French West Africa. Other colonial interest of France which it brought to the negotiation of the Treaty of Rome include other territories in French West Africa namely Senegal, Dahomey (known today as Benin Republic), Ivory Coast, Mauritania, Niger, French Guinea (known today as Guinea), Upper Volta (known today as Burkina Faso); French Equatorial Africa (including Chad (also known as Tchad), Gabon, Middle Congo, Ubangui-Sari); French Togoland and French Somaliland (see Okigbo, fn 4 above, p 26).

57For historical accounts of Italy's colonial experience in Africa see for example, Raymond, B, *The False Dawn: European Imperialism in the Nineteenth Century* (Minneapolis: University of Minnesota, 1975); Palumbo, P, *A Place in the Sun: Africa in Italian Colonial Culture from post-unification to present* (Berkeley: University of California, 2003); Bosworth, R, *Italy and the Wider World 1860 – 1960* (London: Routledge, 1996); Smith, D, *Modern Italy, a political history* (Yale University Press, 1969); Naylor, P, *North Africa: A History from Antiquity to the Present* (University of Texas Press, 2009); and Moore, M, *Fourth Shore: Italy's Mass Colonisation of Libya* (London: George Routledge & Sons, 1940). For Germany, see for example, *Colonial Problem* (London: Royal Institute of International Affairs, 1973); and Louis, H, *The Cold War as History* (OUP, 1967). Luxembourg, did not exist as an independent entity during the colonial race. Although the Netherlands had some colonial experience in the Republic of South Africa (RSA), the latter is outside the scope of this thesis as explained in Chapter One (see Chapter One of this thesis at 1.0., in particular fn 30)

58Belgium's experience was mainly in the Congo where France also had a colonial experience (see Okigbo fn 4 above, p 26). A historical account of Belgium's colonial experience is provided in most of the history text books cited in fn 49 above.

59For a full historical account of these see for example Lynch, F, *France and the International Economy: From Vichy to the Treaty of Rome* (London: Routledge, 1997).

60Indeed, both the French policy of association and the preceding policy of assimilation involved the concept of 'EurAfrican' or 'French family' Indeed, 'EurAfrican' was not a mirage. Not only did France regard the ideas of

Europe and Africa, unable to choose which link should be privileged.⁶¹ In short, it suffices to state that France decided not to sacrifice its African interests, but rather sought to win on both sides.⁶² It successfully convinced the other five Founding Members of the Union, and the Six agreed to “the association of the Overseas Countries and Territories [...]”⁶³ as one of the activities of the ex-Community.⁶⁴ Although France was later joined by Britain⁶⁵ to promote the interests of SSA and the interests of Europe in the former at the EU, as discussed elsewhere in this thesis,⁶⁶ their influence has not always been successful and has definitely not always been heeded even at the threat of incoherence. For while the need for the 'fusion of interest which is indispensable to the establishment of a common economic system' was embraced as declared

liberty, equality and fraternity born during the French Revolution as applicable to all men including its colonies, it in fact granted full civil and political rights of French citizens to the peoples' of its colony with the latter remarkably participating in the French National Assembly (Onwubiko, K.B.C., *School Certificate History of West Africa: AD 1000–1800 (Book One)* (Onitsha: Africana-Fep Publishers Limited, 1985) p 274).

61Claeys, A, “Sense and sensibility’: the role of France and French interests in European development policy since 1957’ in Arts, K, and Dickson, A, (eds.) *EU Development Cooperation: from model to symbol?* (Manchester University Press, 2004), p 113, where the scholar also states more convincingly that the economic attractions of an integrated Europe could not outweigh France’s economic, political and symbolic interests in SSA.

62Ibid.

63Article 3(k) EEC.

64Article 3(k) EEC.

65That is following the latter's accession to the EC in 1973 by virtue of the Treaty between the Member States of the European Communities and the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community, 27 January 1972, in *Documents concerning the accessions to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic*. Volume II (Luxembourg: Office for Official Publications of the European Communities, 1987), p 21-24). Protocol 22 to the Acts of Accession of the United Kingdom, Ireland and Denmark brought in the former British Commonwealth countries in Africa, Caribbean and the Pacific (ACP) as co-parties with the original associates (listed in fn 56 above). This was the origin of the ACP group of States the formation of which was formalised in the 1975 Georgetown Agreement. Hence, while the first two association agreements namely Yaoundé I and Yaoundé II were between the EC and the countries of SSA listed in fn 56 above, the subsequent agreements were between the EU and members of the wider ACP Group of States (see Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed at Yaoundé on 20 July 1963 (Yaoundé I) [1964] *OJL*93/1430; Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed on 29 July 1969 (Yaoundé II) [1970] *OJL*282; Lomé I Convention [1976] *OJL*25/1; Lomé II Convention [1980] *OJL*347/1; Lomé III Convention [1986] *OJL*86/3; and Lomé IV Convention [1989] *OJL*229/1 (amended [1998] *OJL*156/3; and also Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part (hereinafter the Cotonou Agreement) (2000) *OJL*317/3 (First Revision (2005) *OJL*287/1; Second Revision (2010) *OJL*287/3).

66See in general Chapter Six on the CSDP.

in the Schuman Declaration,⁶⁷ same has not been extended to EU policies that evolved on the heels of the common economic system. This is especially visible in the CFSP and CSDP where the legal and institutional dynamics is yet to be fused in a way that the interest of one becomes the interest of all. As discussed in Chapters Five and Six of this thesis, this lack of fusion of interest in these policy fields implicates the coherence of EU external action especially towards SSA where the interface between security and development requires a coherent EU external action. In general, the lack of fusion gives room for the historical notions of ‘spheres of influence’ to come into play despite the active canvassing of the need to overcome this and to have a shared European vision of Africa.⁶⁸ This may not necessarily be active, but also could play out as ‘indifference’ or ‘deference’ on the part of EU Member States that have no historical influence in SSA. Against this background, it can be argued that even though there is a potential for the construction of a more coherent EU external action towards the region⁶⁹ in the light of the Lisbon changes, the long history of Europe’s relations with Africa also has buried in it the potentials for perpetuating the factors that militate against coherence in EU external action towards SSA.

Having said that, it is noteworthy that the aims and provisions of association was provided under Part IV of the Treaty of Rome. The aim of association was “to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole”.⁷⁰ In general, the objectives of association under

⁶⁷It is well known that European interests in Africa differed greatly in the colonial era and was often a source of conflict between the European countries (see for example Taylor, A, *The struggle for mastery in Europe*, 1848-1918 (OUP, 1954); and Robinson, R, *et al*, *Africa and the Victorians* (London: Macmillan, 1961); also see Morel, E, *Africa and the Peace of Europe* (London: National Labour Press, 1917). While this was mainly between France and Britain, the latter did not accede to the Union until 1973 (see fn 65 above).

⁶⁸Vasconcelos, A, ‘Security for Africans’ (2007) 5 *ESDP* p 10.

⁶⁹By this is meant, the construction of a united whole (see 1.2. above).

⁷⁰Article 131 EEC.

Part IV covered trade and commerce,⁷¹ and aid and investment.⁷² However, the fluid and changing nature of what could be regarded as ‘sensitive obligations’⁷³ were set out in an Implementing Convention of five years duration annexed to the Treaty of Rome.⁷⁴ These obligations related mainly to trade and aid with the latter conducted by way of a European Development Fund (EDF).⁷⁵ Trade and aid were the only sectoral policies at this time, and they were entwined in an internal fusion of interest of the Member States within the EU framework.⁷⁶ Essentially, the issue of coherence had not yet arisen at this stage. It can be argued that this was because of the narrow and particularly limited areas of policy at this time. Indeed, trade and development were entwined in EU external relations with SSA in a way that the two are sometimes considered one and the same.⁷⁷

In any event, whatever the implications of the relevant provisions of the Treaty of Rome and the Implementing Convention concerning trade between the Founding Six and the associates,⁷⁸

71Arts 133 and 134 EEC; arts 184 and 185 EC; now arts 200 and 201 TFEU.

72Art 132(3) and (4) EEC; art 183(3) and (4) EC; now art 199(3) and (4) TFEU.

73Bartels (b), fn 31 above), p 133.

74Art 136 EEC; art 187 EC; now art 203 TFEU; it should be noted that the association was not actually favoured by all the other five founding Member States of the EEC at the beginning. For, while Belgium and Italy were in support of France’s association proposal, Germany and The Netherlands were intransigent in their opposition to what they regarded as colonial problems (Werts, J, *The European Council* (The Hague: TMC Asser Institute, 1992), p 14). Accordingly, the eventual compromise reached amounted to the principle that “application to the EEC Treaty to the [...] colonies would be recognised in that Treaty while the details of what this in fact meant would be worked out in a separate protocol”.

75The EDF was established for development assistance to the associates. These funds were almost entirely used for ‘capital aid programmes to develop physical infrastructure such as roads, hospitals and schools’ (see European Commission External Service, ‘Taking Europe to the World: 50 Years of the European Commission’s External Service’, 2004, p 15). Other aspects of association under Part IV were with regards to the right of establishment and free movement of workers.

76See Chapters Three and Four of this thesis.

77Ibid. Indeed, the view has been expressed that trade is development (European Commission, ‘How economic partnership agreements benefit both consumers and producers in Europe and developing countries’, p 2, available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151010.pdf, accessed, 12 January, 2014). However, this is debatable, and it may be more correct to speak of development through trade (see for example Orbie, J, ‘EU Trade and Development Policy: On Pyramids and Spaghetti Bowls’ (2007) *LX Studia Diplomatica* 1, p 109; also see Khaliq, U, U, *Ethical Dimensions of the Foreign policy of the European Union: a Legal Appraisal* (Cambridge University Press, 2008), p 130 where he makes reference to trade-driven poverty alleviation; and further Chapter Three and Chapter Four of this thesis).

78See Chapter Four of this thesis on EU trade policy towards SSA.

for practical purposes, the associated territories considered themselves as belonging to the European customs union.⁷⁹ Indeed, the modalities of the progressive tariff reduction pursuant to the relevant Articles of the Treaty of Rome also applied to them.⁸⁰ In all effects, the protection of the internal market via the CCP protected both the Founding Six and the Associates. Nevertheless, this was the practical beginnings of what would evolve as EU external relations law.⁸¹ The relevant constitutional principles of the EU⁸² required a different legal arrangement between the EU and the Associates at the latter's Independence.⁸³

2.2.4.2. SSA and Association beyond Part IV of the Treaty of Rome

Beyond the provisions of association under Part IV, the Treaty of Rome also provided under Article 238 EEC, for associations “characterised by reciprocal rights and obligations, common actions, and special procedures.”⁸⁴ Arguably, this was in anticipation of the imminent political and juridical change in the status of the SSA associates whose independence were looming at

⁷⁹Okigbo fn 4 above, p 32.

⁸⁰For a detailed account of this see in general Bartels (a) and Bartels (b), fn 31 above; also see Chapter Four of this thesis on EU trade policy towards SSA.

⁸¹Even the EU Delegation began in this context with the required physical presence of the EU Commission for the purposes of administering and accounting for the EDF (see Commission External Action Service, fn 75 above).

⁸²See Section 2.3. below for the relevant constitutional principles of EU external relations.

⁸³At the time of signing the Treaty of Rome, the associates were not sovereign or independent and therefore did not possess the legal capacity required to engage in a legal relationship, hence their association as dependent territories under Part IV of the Treaty of Rome. As classically defined in the *Island of Palmas case (1928) 22 AJIL 875*: “Sovereignty in the relations between States signifies independence. Independence in a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State.” It has been suggested that the Implementing Convention was limited to 5 years because of the prevailing uncertainty at the time, especially regarding the political and juridical development of the associated territories. Indeed, at the time of the Treaty of Rome, the wind of independence was already blowing. In fact, some of the British colonies had already (re)gained their independence, hence predicting the likelihood of the same with regards to all the other colonial territories in SSA. Although ex-British colonies gained independence earlier than the ex-colonies of other relevant EU Member States, they were not parties to the first two agreements due to Britain's late accession to the EC in 1973 (see fn 65 above).

⁸⁴This provision is now enshrined in Article 217 TFEU (ex -Article 310 EC). This is different from the new express provision on international agreements under Article 216 TFEU. The latter do not require the establishment of an association involving reciprocal rights and obligations, common action and special procedure (for a breakdown of these elements which has never been officially explained see Macleod, fn 44 above).

the time of signing of the Treaty of Rome.⁸⁵ However, such argument would be too simplistic especially in the light of the fact that this provision provides that association agreements under this provision may be concluded with 'one or more third countries or international organisations agreements'. Hence while EU external relations may have practically commenced with SSA, it will not be entirely correct to say that this was the only external relations anticipated by the Founding Treaty. Indeed, there was also a provision regarding agreements relating to the CCP and a provision on co-operation with various international organisations including the United Nations and its specialised agencies, the Council of Europe and the Organisation for Economic Cooperation and Development (OECD).⁸⁶ The difference between these other provisions on external relations and the provision on association agreement is that the former two are more precise and specific than the latter in terms of the scope of EU competence.⁸⁷ In the case of 'association agreement', no definition at all is provided about what it might contain nor is there any reference given regarding its parameters.⁸⁸ Thus an association agreement has the potential to accommodate all and every subject matter area. In general, association agreements provide an instrumental space for 'an all-embracing framework to conduct bilateral relations.'⁸⁹ They therefore have no policy coverage limits and can accommodate any and every field of EU external action covered by the Treaties.⁹⁰ Indeed, from all indications, an association agreement

⁸⁵This is considered, even if controversially, the framework for the post-independence association of the independent SSA countries which were previously associated under Part IV. In any event, it eventually became the veritable framework for EU external relations relations with the countries of SSA.

⁸⁶Article 220 TFEU (ex Article 302 to 304 EC).

⁸⁷Although, the scope of the CCP may not be quite precise, there is at least an indication of what it is about. On the meaning of EU competence and the scope of EU external competence (see 2.3. below).

⁸⁸See Eeckhout, P, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, 2004), p 103 who explains that the text of the provision on association under Article 217 TFEU (ex -Article 310) TEU as set out in the previous page is not a model of clear drafting but merely highlights the structural components while being silent on the substance (see fn 83 above).

⁸⁹European External Action Service, 'Association Agreements', available at <http://eeas.europa.eu/association/>, accessed 30 March 2014.

⁹⁰See for example Case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719; [1989] 1 CMLR. In this regard, Eeckhout explains that 'it is only in the context of association that one sees the full and complete external dimension of [EU] policies.' Eeckhout, fn 88 above, p 103.

could even cover a field of activity that is not necessarily provided for in the Treaties.⁹¹ This has allowed the evolution of EU relations with SSA beyond trade and aid to include political objectives,⁹² and other wider responsibilities which arose as a corollary to the EU's position as a powerful polity.⁹³ Pertinently, with the evolution of EU objectives the need for coherence between the distinct policies bearing the objectives also arose.⁹⁴ The following section traces the evolution of the requirement of coherence in EU external relations law and policies through the evolution of EU external competences. It also provides a necessary background to the subsequent overview of coherence as it relates to EU objectives towards SSA.⁹⁵

2.3. The requirement of coherence in context: of the evolution of EU external competences

The context of this thesis namely EU external action towards SSA was introduced in Chapter One of this thesis.⁹⁶ In contrast, this section places the requirement of coherence in EU external relations with SSA in context. In this regard, it discusses the evolution of EU external competences. It is within these contexts that the evolution of the requirement of coherence is discussed.

91 Illustrative is the pre-Maastricht EU development cooperation policy which was not provided for in the Treaties but has been at the core of the successive agreements between EU and SSA (See Chapter Three of this thesis).

92 This began with the introduction of human rights in Article 5 of Lomé IV (see Chapter Four of this thesis). As will be recalled from Chapter One of this thesis, Lomé IV is the 6th successive association agreement (signed in 1989) in the context of EU external relations with SSA (see 1.0. above, especially fn 28).

93 European Commission, *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, COM (2006) 278 Final, 3-4. For a discussion of EU objectives towards SSA, see 2.4. below.

94 Significantly, this did not commence with the interaction between trade policy and development policy which were originally at the heart of EU external relations with SSA. These were traditionally entwined in the context of EU external relations with SSA in a way that portrayed EU development policy and EU trade policy towards SSA as one and the same policy (see 2.2.4.1. above).

95 At 2.4. below.

96 See 1.0. above.

2.3.1. The EU's capacity to act externally and the evolution of EU external competences

The EU and the ex-Communities on which it is founded are creations of international law which owe their existence to the will of the Member States as expressed in the constitutive Treaties.⁹⁷ Hence, they have no inherent sovereign powers.⁹⁸ The 'powers' or competences⁹⁹ of the Union are 'conferred'¹⁰⁰ on it by the Member States.¹⁰¹ This principle of 'conferral'¹⁰² as entwined with the notion of competence in the Treaties¹⁰³ holds the implication that only limited powers are conferred on the EU.¹⁰⁴ Effectively, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.¹⁰⁵ The principle of conferral applies to external competences of the Union,¹⁰⁶ and external competences not conferred upon the Union in the Treaties remain with the Member

97The question of the legal personality or the international legal capacity of the Union has been rendered obsolete by the Treaty of Lisbon. By virtue of a combination of Article 1 TEU and Article 47 TEU. As Khaliq explains: "In international law, personality is the basic proposition that an entity whether it is a state, intergovernmental organisation or person, has in specific context some legal capacity." (Khaliq, fn 77 above, p 20); also see Khaliq, U, 'Treaty Conflict and the European Union, or Conflicting Perspective on the European Union?' (2012) ELRev. 495, at 498-9; and Sari, A, 'The Conclusion of International Agreement in the Context of the CSDP' (2008) 57 *ICLQ* 53, for how this question was settled even before Lisbon by virtue of implied legal personality. However, this may not have laid to rest the question of whether the EU is a classic international organisation or not. Nevertheless, despite this debate, there is no doubt that the EU is not a state (see for example, the German cases *Maastricht* [1994] 1 *CMLR* 57; and *Lisbon* [2010] 3 *CMLR* 13, 276 where the EU is defined as a *Staatenverbund* (a German word for the association of sovereign states); and for a recent discussion of the EU as a *Staatenverbund* see in general, Guastaferrro, B, 'The European Union as a *Staatenverbund*? The endorsement of the principle of conferral in the Treaty of Lisbon' in Trybus and Rubini, fn 26 above, p 117).

98Macleod, fn 44 above, p 39-40.

99The legal power to act or 'jurisdiction' - which is what 'competence' will directly translate to, from its origin in the French legal term *la compétence*; also see Orebech, P, 'The EU Competency Confusion: Limits, "Extension Mechanisms", Split Power, and "Institutional Clashes"', (2003) 13 *JTLP* 1, p 107.

100Or 'attributed' (of course, this dates back to the ex-Communities).

101See Article 5 (2) TEU (ex-Article 5 TEU).

102Also known as the principle of attribution. However, since 'conferral' is the term employed in the Treaties, it is employed in this analysis for ease of reference. Indeed conferral, is the term used in international law (see for example Sarooshi, D, *International Organizations and Their Exercise of Sovereign Powers* (OUP, 2005), especially Chapter 3). Hence the principle is not only a fundamental principle of EU external relations, but also of international law. In international law, only states possess the totality of rights and duties (see Advisory Opinion, *Reparations for Injuries Suffered in the Service of the United Nations* [1949] *ICJ Reports* 174, 179). This statement is not to suggest that international law has been accepted as supreme to EU legal order (see for example fn 212 below).

103Article 5 TEU (ex-Article 5 EC as amended).

104Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

105Article 5 TEU (ex-Article 5 EC).

106As it applies to the internal (*Opinion 2/94 Accession by Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759).

States.¹⁰⁷ However, this is not to say that the scope of EU external competences or the delineation of competence between the EU and the Member States is always clear cut.¹⁰⁸ The situation remains same post as pre-Lisbon despite the express delineation of competences in the Treaties.¹⁰⁹ According to De Witte, this lack of clarity in the delineation of competence between the EU and the Member States renders the field of EU external relations a clear case of politics versus law.¹¹⁰ Indeed, from all indications, the field of EU external relations law and policies is located in a grey zone of complex interaction between law and politics.¹¹¹ Negotiating this complex interaction has meant embracing flexibility and pragmatism albeit not without unavoidably staking the determination of certainty in almost every aspect of EU external relations law and policies including the requirement of coherence.¹¹² It has been suggested that flexibility, which sometimes entail differentiation actually strengthens unity.¹¹³ However, whether this is always the case is another question altogether. For it can be argued that while flexibility can aid institutional and instrumental malleability for the achievement of EU objectives and the requirement of coherence, it can also mar same.¹¹⁴ In any event, it also cannot be left

107Article 5 TEU (ex-Article 5 EC as amended); Article 4 TEU and Article 2 TFEU.

108On the expansion of the scope of EU competence beyond the express competences see 2.3.2. below. In contrast, the nature of EU competence (that is whether it is exclusive, shared or indeterminate) is discussed in the relevant sections of the subsequent Chapters of this thesis. On another note, Article 1 TEU (ex-Article 1 TEU as amended) has rendered obsolete the question of division of competence between the ex-Community and the EU (Case C-176/03 *Commission v Council* [2005] ECR I-7879, para 40; and C-440/05 *Commission v Council* [2007] ECR I-0000, at para 54).

109See Article 3 TFEU (on EU exclusive competences), Article 4 TFEU (on shared competences), Article 6 TFEU (on supporting, coordinating and complementing competences), and Article 5 TFEU (competences to provide arrangements within which EU Member States must coordinate policies). Indeed, it cannot be said with certainty what is the exact meaning of these different types of EU competences.

110De Witte, B, 'Politics versus Law in the EU's Approach to Ethnic Minorities', in Zielonka, J, (ed.), *Europe Unbound. Enlarging and Reshaping the Boundaries of the European Union* (London: Routledge, 2002), 137-160.

111See for example, Holdgaard, R, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (The Hague: Kluwer Law International, 2008), p where he explains that EU external relations law cannot be studied or applied without a constant awareness of the underlying political dynamics. In general, the EU is *sui generis* (Denza, E, *The Intergovernmental Pillars of the EU* (OUP, 2002), p 1; and also De Baere, G, *Constitutional Principles of EU External Relations* (OUP, 2008), p 1). In the same vein, some of the Union's *modus operandi* are also *sui generis* (see for example, Chapter Five of this thesis).

112See 2.5. below.

113See in general, De Witte, B, *et al* (ed.), *The Many Faces of Differentiation in EU Law* (Antwerpen: Intersentia, 2001).

114See Chapter Five on the CFSP, Chapter Six on the CSDP, and Chapter Seven on the JAES.

unsaid that an understanding of the limits of the EU's competences in the light of its status as a *Staatenverbund*¹¹⁵ is crucial to an understanding of the limits of EU law. This is for all purposes including in relation to prescribed requirements such as coherence. As Thym explains, the *Staatenverbund* continues to serve as the conceptual underpinning of the derivative character of the EU legal order where ultimate authority rests with the Member States.¹¹⁶ With specific regards to coherence, Khaliq emphasises the crucial place of the Member States when it comes to the needed sacrifices for coherence in EU external action.¹¹⁷ It is not clear where these leave the legally correct affirmation that coherence is contingent on the principle of conferral and its corollary, namely the question of legal basis.¹¹⁸ Or perhaps, it is?¹¹⁹

2.3.2. The evolution of EU external competences and the requirement of coherence thereto¹²⁰

The reasons for the EU's foray into external relations has been discussed above. However, for all that has been said, EU external competences have evolved with integration. This has been achieved through successive Treaty amendments and also through the jurisprudence of the ECJ

¹¹⁵See fn 97 above.

¹¹⁶Thym, D, "In the name of Sovereign Statehood: a Critical Introduction to the Lisbon Judgement of the German Constitutional Court" (2009) 46 *CMLRev.* 1795, at 1799; also see Koutrakos, P, 'Primary law and policy in EU external relations-moving away from the big picture' (2008) 33 *EL Rev* 666 at 674-676; also see Holdgaard, fn 111 above.

¹¹⁷See for example Khaliq, U, 'The Treaty of Lisbon and the future of European law and policy' in Trybus and Rubini fn 26 above, p 260; and also Khaliq, fn 7 above, p 139. Having said that, it is noteworthy that not all aspects of the requirement of coherence in the context of EU external relations law and policies are easy to determine (see 2.5. below).

¹¹⁸See Franklin, C, 'The budgeoning principle of consistency in EU law' (2011) 30 *YEL* 1, p 60-61. It is noteworthy that this is often referred to as either 'legal base' or 'legal basis' in various academic literatures. Both are used interchangeably in this thesis. The requirement for a legal basis applies to both internal and external action. For the relevance of legal basis to the coherence discourse see 2.3.3. below.

¹¹⁹See 2.3.3. below; and also in general 2.5. below; and Chapters Three to Six of this thesis.

¹²⁰As mentioned in Chapter One, the issue of vertical coherence which arises in the context of the interaction between EU and the Member States in the exercise of their competences is outside the scope of this thesis (see 1.2. above). In contrast a discussion of the scope of EU external competence is an aspect of this thesis. The latter is part of the background for the discussion of the evolution of EU objectives towards SSA, as it is for the discussion of the requirement of coherence both in EU external action in general, and towards SSA in particular.

with the former in fact often inspired by the latter. Indeed, despite the general *Staatenverbund* status of the EU, there is room to admit that there is a kind of dialogue between the ECJ and the Member States acting as *constituante* on the external competences of the Union.¹²¹

Pertinently, on the heels of the evolution of EU external competences is also the evolution of the requirement of coherence in EU external action. Indeed, as mentioned above,¹²² although coherence *prima facie* gained attention in the build up to and in the wake of the Lisbon Treaty, the question of coherence has a long history in EU external relations law and practice.¹²³

The external competences explicitly conferred on the ex-Community by the Treaty of Rome were limited. As mentioned above, these include competences to conclude and enter into agreements relating to the CCP, to conclude association agreements, and to co-operate with various international organisations. However, there was also a general competence under Article 235 of the Treaty of Rome.¹²⁴ By virtue of this provision, the EU can act where the Treaties have not provided the necessary powers but an action was necessary “within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties”.¹²⁵ In Case 22/70 (*ERTA*), the ECJ established that this provision also applies to external action.¹²⁶

121See Jan Kuijper, P, 'Fifty Years of EC/EU External Relations: Continuity and the Dialogue between Judges and Member States as Constitutional Legislators' (2007) 31 *FILJ* 6, p 1572; also see in general, Orebech, fn 99 above; and p 55 below, especially fn 152 on the judicially birthed principle of implied competence.

122At 1.0. above.

123Nevertheless, the requirement of coherence does not date back to the Treaty of Rome for obvious reasons.

124Article 352 TFEU (Ex-Article 308 EC).

125See for example *inter alia*, Case 45/86 *Commission v Council* [1987] ECR 1493, paragraph 13; and Case C-271/94 *Parliament v Council* [1996] ECR I-1689, paragraph 13.

126It has been suggested that this was the legal basis for the post-Treaty of Rome association agreements between EU and SSA (see Djamson, E, *The Dynamics of Euro-African Co-operation* (The Hague: Martinus Nijhoff, 1976), p 70-71).

Beyond the Treaty of Rome, the evolution of EU external competences began with the SEA. This extended EU external competence to two other areas namely, environment¹²⁷ and research and technological development.¹²⁸ It also formalised the previously informal EPC by giving it a Treaty status.¹²⁹ According to Guattier, the two faces of the coherence principle¹³⁰ were laid down by the SEA at this point.¹³¹ Indeed, with the formalisation of a dual EU external relations also came the formalisation of the requirement of coherence. This was couched in Article 30(5) SEA as follows: 'The external policies of the European Community and the policies agreed in [EPC] must be consistent.' However, even prior to the SEA, 'an embryonic form of the coherence requirement'¹³² had been formed on the recognition that the EPC and the other formal fields of external relations could not operate in total isolation from each other.¹³³ The coherence requirement was pursued by way of an institutional link between the two mechanisms.¹³⁴ This was an early illustration of the recognition of the role of institutions in enhancing the coherence of EU external action. Indeed, there is no doubt that institutions can enhance the coherence of EU external action, especially where there is political will, including on the part of Member States.¹³⁵ Significantly, both,¹³⁶ to a varying extent set the pace for the evolution of the requirement of coherence, as they do the external competences of the Union.¹³⁷

127Article 191 (ex-Article 174(4) EC).

128Articles 180(b) and 186 (ex Articles 164(b) and 170 EC).

129Article 1 (sub-paragraph 3) and Title III SEA; also see 2.2.3. above.

130Vertical and horizontal coherence (see 1.3. above).

131Gauttier, P, 'Horizontal Coherence and the External Competences of the European Union' (2004) 10 *ELJ*, p 23-41.

132Koutrakos, P, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart, 2001), 10.

133Ibid.

134The key institution in this regard was the European Council (see 2.5. below). Although it was neither then nor contemporarily listed as an institution in the Treaties, the European Council was also accorded Treaty Status in the SEA (Article 2 SEA).

135As discussed in the different Chapters on policy case study, the Member States and the institutions have different levels of political influence depending on the policy at stake. In any event, whether they can 'ensure' coherence as provided in the Treaties is another question entirely (see 2.5.1.1. below).

136The EU and the Member States.

137See fn 135 above.

Subsequent to the SEA, the next express expansion of the external competence of the Union was at Maastricht. The Maastricht Treaty established the CFSP as it morphed from the EPC. It also codified development cooperation policy.¹³⁸ Furthermore, it added some sectors in which EU and Member States could cooperate with third countries and competent international organisations.¹³⁹ However, it was the legally and procedurally distinct CFSP that upped the stakes for coherence. In contrast to the informal EPC and ex-Community dichotomy, a structure akin to a 'Chinese wall' was erected between the CFSP and the non-CFSP external relations by virtue of ex-Article 47 TEU. This Article provided that the CFSP shall not affect the non-CFSP external relations under the ex-Community. A provision on coherence under ex-Article 3(2)TEU required the coherence of EU external activities as a whole in the context of its external relations, security, economic and development policies. Furthermore, a ground was also laid for what is contemporarily known as Policy Coherence for Development (PCD).¹⁴⁰ This was done by way of a specific provision requiring the Union to take account of the objectives of development cooperation in the policies that it implements which are likely to affect development countries.¹⁴¹ Essentially, PCD is about the coherence of the objectives of other EU external policies with the objectives of development policy.¹⁴²

In so far as the distinction between the non-CFSP and CFSP external action is mainly legal and procedural, the requirement of coherence was pursued by means of a 'single institutional

¹³⁸Articles 208 - 211 (ex-Articles 177 – 181 EC). This is a codification of what was already in practice say for example in EU external relations with SSA (see 3.1. below).

¹³⁹These include education under Article 165 TFEU (ex-Article 149(3) EC); vocational trainings under Article 166(3) TFEU (ex -Article 150(3) EC); culture under Article 167 TFEU (ex- Article 151(3) EC); and public health under Article 168 TFEU (ex-Article 152(3) EC).

¹⁴⁰See 2.5.1.1.2.; and 2.5.2. below.

¹⁴¹Ex-Article 178 EC (Article 130v of Maastricht Treaty).

¹⁴²A requirement quite different from the general requirement for the coherence of EU external policies (see 2.5.1.1.2.; and 2.5.2. below).

framework which shall ensure the consistency and the continuity of the activities carried out'.¹⁴³

The essence of this provision is that the same set of institutions applies to both the political dimension of external relations and the economic dimension.¹⁴⁴ Suffice it to state that while this arrangement is not a window dressing, the institutions were not functionally fused for the purposes of the CFSP and non-CFSP external action. Institutional competences were, and have remained clearly delineated between these two dimensions of EU external action¹⁴⁵ which at all times are legally and procedurally separate.¹⁴⁶

The Amsterdam Treaty more visibly extended the CCP competence of the EU to cover international agreements in the areas of services and intellectual property. However, it is arguable that it also considerably started the legal evolution of the military side of the CFSP namely the CSDP. Indeed, it included a provision¹⁴⁷ drafted to permit the Union to work with or through the Western European Union (WEU).¹⁴⁸ As discussed in Chapter Six of this thesis, this is the evolutionary path of what eventually emerged as the EU's CSDP competence at Lisbon. The Nice amendment which followed Amsterdam provided the first leg on the ladder for CSDP crisis management¹⁴⁹ which was also concretised at Lisbon. Through all the above

¹⁴³Ex-Article 3 TEU.

¹⁴⁴The Lisbon amendments has rendered obsolete the debate surrounding the single institutional framework and its implications (for the debate see for example, Wessel, R, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (The Hague: Kluwer, 1999, p 74-75); Everling, U, 'Reflections on the Structure of the European Union' (1992) *CMLRev.*, 1053 – 1077; Curtin, D, M, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) *CMLRev.*, 17-67; Curtin, D, M, and Dekker, I, F, 'The European Union as a 'Layered' International Organisation: Institutional Unity in Disguise' in Craig, P, and De Burca, G, (eds.) *European Union Law: An Evolutionary Perspective* (OUP, 1999); Kapteyn and Verloren Van Themaat, fn 18 above, p 310-311).

¹⁴⁵Institutional competences in the context of the different policies are discussed in the relevant substantive Chapters on the distinct EU policies towards SSA (see Chapters Three, Four, Five and Six of this thesis).

¹⁴⁶See Chapter Five of this thesis for the CFSP procedure.

¹⁴⁷Ex-Article 17(2) TEU.

¹⁴⁸The now defunct Western European Union (WEU) was a regional organisation formed by the European Member States of the Northern Atlantic Treaty Organisation (NATO) and Turkey. For further information on the WEU see <http://www.weu.int/>, accessed 25 February 2011.

¹⁴⁹See Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts [2001] *OJ C80/01*, and in particular Article 1(2) amending ex-Article 17

successive Treaty amendments, the provisions on coherence remained the same as introduced at Maastricht Treaty although policy coherence for development continued to evolve outside the Treaties. It is not until Lisbon that the legal requirement of coherence was again revisited. Indeed, as mentioned in Chapter One, the Lisbon amendment was more about addressing the issues surrounding the coherence discourse than about any other aspect of external action.

In general, the Lisbon amendment as it relates to EU competence is both minimal and expansive at the same time. It is minimal with regards to the expansion of express EU competence. In this regard, it mainly codified what were already in practice¹⁵⁰ and pertinently constitutionalised the CSDP.¹⁵¹ In contrast, the expansive dimension of the Lisbon amendment as it relates to the EU's external competence stems from the constitutionalisation of the doctrine of implied competence under Article 216(1) TFEU. This provides for EU competence to act externally:

“where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”¹⁵²

TEU. The other amendments of this Treaty are outside the scope of this analysis.

150For example, it expanded the CCP to cover Foreign Direct Investment (FDI) (Article 91(1)(a) TFEU (ex-Article 71(1)(a) EC)), and codified the European Neighbourhood Policy (ENP) (by virtue of a new Article 8 TEU) and humanitarian aid (by virtue of Article 214 TFEU). Similar to the pre-Maastricht practice of EU development policy (see 3.1. below), EU humanitarian policy previously had no Treaty basis and was implemented as an aspect of development cooperation policy following the latter's codification at Maastricht (see for example De Baere, fn 111 above, p 15 where he referred to this as dubious). This practice which in principle runs contrary to the principle of conferral (discussed at 2.3.1. above) and the attendant requirement of a legal basis for EU competence to act (see 2.3.3. below) is a clear example of the flexibility and pragmatism of EU external relations law and policies (2.3.1. above).

151Previously the European Security and Defence policy (ESDP).

152This was based on the recommendation of the External Action Working Group that there should be a Treaty provision to reflect the case law of the Court of Justice (CONV 459/02, Final Report of Working Group VII on External Action, Brussels, 16 Dec 2002, detailed report of discussions, para 18). The pertinent cases include Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263; *Kramer* (Joined Cases 3, 4 and 6/76 *Cornelis Kramer* [1976] ECR 1279; *Opinion 2/91(Re ILO Convention 170)* [1993] ECR 1-1061; and *Opinion 1/03 Lugano Convention* [2006] ECR 1-1145 (which is extensively analysed by in Koutrakos, P, ‘Current Developments: European Union Law’, (2010) 59 *ICLQ* p 482).

Overall, it could be concluded that the scope of EU external competence traverses the express EU external competences, the internal competences of the EU as they may be affected by the former, and in fact any action that could contribute to achieving the whole gamut of EU objectives¹⁵³ and values.¹⁵⁴ The legal implication of this is that it can no longer be said with confidence to what extent the outer limits of these powers in practice, are definable. Indeed, it is arguably apparent that the laws have the potential of expansion to accommodate the dynamics for the achievement of the Union's international objectives. In the light of this nearly indefinite scope of EU external competence, it can be argued that the question regarding whether EU external competences should be increased¹⁵⁵ is a question that may relate more to the internal dimension of EU policies than the external. With regards to the latter, a more pertinent question is how to make a coherent whole of the existing external competences which clearly traverse all fields of external policy as are derivable from the relevant legal basis.

2.3.3. The question of the legal basis for the exercise of EU external competences and its imperative for coherence

As mentioned above, the corollary to the principle of conferral is that there must be a legal basis for any EU action.¹⁵⁶ This applies to EU external action.¹⁵⁷ A legal basis can be either

¹⁵³This is including, but not limited to the express external objectives under Article 21(2) TEU (discussed at 2.4.1 below). In this regard, also see the general EU objectives enshrined in Article 3 TEU.

¹⁵⁴Although values are *prima facie* similar to objectives, the former is usually at the heart of or the driving force of the latter. EU values are mainly enshrined in Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." They could also be found in the Preamble to the Treaties.

¹⁵⁵A panel on the topic 'Reforming the EU: Fewer or More Competencies?' was proposed for the University of Birmingham Institute of European Law 4th Conference on European Law & Policy in Context, 26th - 27th June 2014, Birmingham Law School). Having said that, it is necessary to keep in mind that the expansion of EU competence does not mean that the Member States are stripped of their competences in those areas of EU competence.

¹⁵⁶At p 50, in particular fn 118. The legal basis is 'often' referred to in the relevant decision or implementing measure.

¹⁵⁷*Ibid*. Indeed, the choice of legal basis is so constitutionally significant that an incorrect legal basis will lead to invalidation of an act, and in the context of external action will create complications both at "EU level and in the international legal order" (Opinion in Case C-2/00 *Cartegena Protocol* [1996] ECR I-1759; also see for example Case C-91/05 (*ECOWAS*) [2008] ECR I-3651). In the context of international agreements, invalidated agreements

substantive or procedural, and can sometimes bear both imports in terms of the power it confers. Substantive attribution has to do with the empowerment or legal authorisation to act in certain fields or in furtherance of certain objectives as identified in the legal basis. Procedural attribution has to do with the required procedure or specified legal means for doing the things authorised.¹⁵⁸ In any event, legal basis holds constitutional and practical importance to the issue of horizontal coherence. This is because the legal basis for each policy is the pivot which the legal scope of distinct policies, their procedures and institutional aspects revolve around.¹⁵⁹ These are important aspects of the coherence discourse and are relevant for answering the research questions, even if only to a certain extent, in the light of the flexibility attendant to the limits of the law and the constraints of politics in EU external action as indicated above.¹⁶⁰

Having said that, it is noteworthy that the legal basis for EU external action is not restricted to the provisions of the Treaties. As indicated earlier, association agreements are overall frameworks that could bring together disparate objectives and different fields of EU policy and even import fields not codified in the Treaties. Significantly, once agreed, the provisions of association agreements become integral parts of EU law.¹⁶¹ In effect, not only are they capable of having direct effect in EU legal order,¹⁶² they also provide legal basis for EU external action

are nonetheless to be binding on the EU in order to protect third parties and to comply with the 1969 Vienna Convention on the Law of Treaties (VCLT) (Case C-327/91 *France v Commission* [1994] ECR I – 3641, at para 25).

158Dashwood, A, ‘The attribution of external relations competence’ in Dashwood, A, and Hillion, C, *The General Law of EU External Relations* (London: Sweet & Maxwell, 2000), p 121.

159Opinion in Case C-133/06 *Parliament v Council* [2006] OJ C108/12, at para 32; also see Cremona, M, ‘Defining competence in EU external relations: lessons from the Treaty reform process’ in Dashwood, A, and Maresceau, M, (eds.) *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008), p 39.

160See 2.3.1. above.

161See in particular Case C-91/05 (*ECOWAS*), fn 157 above, para 37-38; also see Macleod, fn 44 above, p 368.

162See for example, Case 469/93 *Amministrazione delle Finanze dello Stato Chiquita Italia* [1995] ECR I-4533, para 40; and Case C-87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze (Bresciani)* [1976] ECR 0129. It is noteworthy that the general legal effect of association agreement on the parties to the agreement is not clear. For example, with specific regards to the Cotonou Agreement, it should be noted that although the relationship is said to be contractual (Green Paper on Relations between EU and ACP on the Eve of

towards the relevant third parties. This is significant because the substance of an association agreement depends on the consensual agreement of the EU and the Member States on the one hand,¹⁶³ and the relevant third party on the other hand. Perhaps, even more significant is the fact that provisions of an association agreement arguably cuts across primary substantive legal basis and secondary implementing legal basis.¹⁶⁴ Illustrative is the Cotonou Agreement signed in the context of EU external relations with SSA as ruled in the *ECOWAS* case.¹⁶⁵ However, as the ECJ established in *Portugal v Council*, this is not to say that the mere inclusion of provisions for cooperation in a specific field in an agreement predetermines the legal basis of EU acts for implementing cooperation in such a field.¹⁶⁶ Suffice it so state that there is room for flexibility and pragmatism even with regards to the question of legal basis despite the principle of conferral. Of course, this makes it difficult to determine the extent of the impact of legal basis on the question of coherence. In any event, in so far as the thesis is primarily based on a legal analysis, the legal basis for the relevant policies examined in this thesis are discussed in the relevant Chapters.

21st century, Chapter 2, Part 6), the EU insists that its obligations toward the ACP did not tie its hands in its external commercial policies in any way (see Ravenhill, J, 'Europe's Relations with the African, Caribbean and Pacific Group of Countries: Back to the Nest?' in Aggarwal, V, and Forgaty, E, (ed.), *EU Trade Strategies: Between Regionalism and Globalism* (London: Palgrave Macmillan, 2004), p 121).

¹⁶³Even though the Treaties expressly provide that it is the EU that may conclude an association agreement, the Member States are fully involved and shares the competence (see Case 87/75 *Bresciani* fn 162 above). This is made possible by the legal phenomenon of mixity – a legal phenomenon peculiar to EU external relations law, and perhaps one of the aspects of the law and practice of EU external relations that render this field of legal studies incomprehensible and impenetrable by traditional legal standards (see for example, Holdgaard, fn 111 above, p 2). For further analysis of mixity see Chapter Three of this thesis at 3.3.1.

¹⁶⁴The Court of Justice of the European Union (ECJ) has confirmed the possibility of a legal distinction between a legal basis for the conclusion of an international agreement and a legal basis for implementation (*Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property (WTO)* [1994] E.C.R. 1-5267, at para 29; Case C-268/94 *Portugal v Council* [1996] ECR 1-6177 at para 47 and 67). Depending on their wording and context, the provisions of an agreement may constitute a substantive legal basis for their implementation (Case C-268/94 *Portugal v Council*, para 67).

¹⁶⁵Case C-91/05 (*ECOWAS*), fn 157 above. In this case, the Council argued that the Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons falls under the CFSP. In contrast, the Commission contended that it falls under development policy, and hence ought to have its legal basis in the Cotonou Agreement.

¹⁶⁶Case C-268/94 fn 164 above, para 47.

2.4. Coherence of what? EU objectives towards SSA: the Cotonou Agreement and beyond

The three evolutionary aims of EU external action discussed above are the pivots which the Union's external action policies and their objectives revolve around. In general, those initial objectives represent the core EU external policies namely Trade (CCP), development cooperation, the CFSP and the CSDP. Indeed, while EU external policies have many dimensions, the wide scope of these four core policy areas means that the other external policies could mainly be categorised as aspects of these core four policies.¹⁶⁷ More significantly, by virtue of the Lisbon amendment, there is a new dimension to the pre-Lisbon dispensation where each EU external policy had its objective expressly attached to its provision or related provision(s) in the Treaties.

2.4.1. The amalgamated objectives of EU external action

One other significant change made at Lisbon which is pertinent to the coherence discourse is the amalgamation of the objectives of EU external action under Article 21(2) TEU.¹⁶⁸ This

¹⁶⁷For example, EU humanitarian aid policy and environmental policy can be categorised as aspects of EU development policy (indeed, see fn 150 above). Furthermore, human rights is a cross-cutting policy and an aspect of both the CFSP and development policy.

¹⁶⁸"2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation *in all fields of international relations*, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance." This provision of Article 21(2) recaptures Article 3(5) TEU: "In its relations with the wider world, the Union shall [...] contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

amalgamation of all EU external objectives under one provision hold the connotation that these objectives can be pursued through any of the EU external policies. In fact, Article 21(3) TEU explicitly provides for this.¹⁶⁹ This stands to reason in the light of the cognisable influential interface between the different EU external policy objectives despite their distinct functional aspects. With specific regards to coherence, Koutrakos explains that the bringing together of different fields of EU external action within a common framework pursuing a set of common values, principles and objectives under Article 21(2) TEU is aimed at facilitating coherence.¹⁷⁰ However, it is noteworthy that this alignment of the different fields of external action under Article 21(2) TEU at Lisbon does not mean that there are, *de facto*, no more express distinct EU policy objectives.¹⁷¹ Suffice it to state that Article 21(2) and (3) TEU unnerves the historical rigid distinction between the CFSP and the non-CFSP external action.¹⁷²

Nevertheless, it will be too simplistic to argue that this distinction reeks of the legalisation of

¹⁶⁹See Case C-377/12 *Commission v Council* [2014] Judgment of the Court (Grand Chamber) of 11 June 2014, at paras 36 and 37.

¹⁷⁰Koutrakos, fn 132 above, p 675.

¹⁷¹Indeed, as discussed in the relevant subsequent Chapters of this thesis, trade policy and development cooperation policy continue to retain their specific objectives under the relevant distinct provisions of the Treaties. In the same vein, the CSDP has specific objectives. This is despite the fact that it is an integral part of the CFSP which itself has no specific policy objectives beyond the general objectives of external action under Article 21(2) TEU. Indeed, as mentioned earlier, the CFSP right from origin uniquely covers ‘all areas of foreign and security policy.’ This is also logical when viewed in the light of the fact that all EU external policies are foreign policies. Indeed even development policy is foreign policy in the light of the values and influences it promotes abroad (see Smith, K, *European Foreign Policy: What it is and What it does* (London: Pluto Press, 2002), especially p 8). It can be argued that the latter is recognised within the EU (see McMahon, J, *The Development Cooperation Policy of the European Community* (The Hague: Kluwer, 1998), p 5, where he notes the resistance of the Member States to giving ‘foreign policy’ mandate to the ex-Community when the Commission proposed a more supranational development policy a few years after the Treaty of Rome.

¹⁷²See 2.3.2. above. In fact, a mutual non-affectation clause was introduced at Lisbon by virtue of Article 40 TEU (ex-Article 47 TEU as amended): “The implementation of the [CFSP] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the [TFEU]. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.” This is different from the earlier provision under ex-Article 47 (see p 17 above). For this reason Peers regards the amalgamation of EU external objectives at Lisbon as a paradox which while aimed at enhancing the coherence of EU external action, is nonetheless rife with contradictions (Peers, S, ‘Is readmission linked to development?’, a blog entry in EU Law Analysis blog, 23rd January 2014, available at <http://eulawanalysis.blogspot.co.uk/2014/01/is-readmission-linked-to-development.html>, accessed 15 January 2015).

political expediency for the purposes of delimiting the more supranational institutional competences.¹⁷³ As can be deduced from the discussion of the evolution of EU external competences, the secular trend that started with a separate EPC, through to its distinction on codification at SEA, and an eventual culmination in a legally distinct CFSP has always been intended. At all times, it is a conscious choice by EU Member States to continue to maintain a strict separation between a ‘more intergovernmental’ EU external action in the ‘sensitive’ political and foreign policy fields on the one hand, and a ‘more supranational’ EU external relations in the economic oriented policies on the other hand, as is agreeable to the Member States.¹⁷⁴ This is by no means a denial of the attendant potential ‘organisational dysfunction *vis-à-vis* agreed policy objectives’¹⁷⁵ and the implications of this for coherence.¹⁷⁶ But as this thesis illustrates, the latter which is mainly a question of institutional coherence is not the sole issue surrounding the question of coherence in EU external action. In fact, it is mainly an internal issue which may not necessarily hold any implication for coherence beyond the constitutional dynamics that occasions internal institutional turf battle.¹⁷⁷ *A contrario*, there are issues regarding coherence in the interaction between the interaction of other policy objectives with

173For example, the choice of a CFSP action as opposed to non-CFSP delimits and greatly reduces the influence of the European Commission (see 2.4.3 below) while concentrating more power on the Council and EU Member States (see Chapter Six of this thesis on the CFSP); also see Weatherill, S, “Competence creep and competence control” [2004] 23 *YEL* 1; and Dashwood, A, “The Limits of European Community Powers”(1996) 21 *EL Rev.* 113 for the position that the CFSP helps the Member States in their desire to regain control and limit EU ‘creeping competence’ phenomenon as made possible by the integrative jurisprudence of the ECJ.

174See 2.2.3. above, especially p 7. Also see for example, Trybus, fn 3 above, 3-4, where he explains that there are no purely intergovernmental or supranational organisations, but rather that the notions of ‘supranational’ and ‘intergovernmental’ are opposite ends of a spectrum from which can be derived the classification of organisations and institutions as ‘more intergovernmental’ or ‘more supranational’; also see Pescatore, P, *The Law of Integration* (Leiden: A.W. Sijthoff, 1974, p 51, who explains that while the EU Commission might be supranational in the sense that it is an autonomous institution, a true construction of the EU arrangement even where the Commission is truly involved cannot lead to a conclusion of ‘supranationality’ – the essence of which is “a real and autonomous power placed at the service of objectives common to several states”). Therefore in general, there is no strand of EU policy that is completely supranational or completely intergovernmental. It is always a case of more or less so, with a certain level of flexibility that makes for malleability between the two forms of integration.

175Beger, N, and Bartholme, P, ‘The EU’s quest for coherence in peacebuilding: between good intentions and institutional turf wars’, (2007) 1 *Studia Diplomatica*, p 245-264, at 261.

176Perhaps, the clearest illustration of this is the security-development interface (see for example Case C-91/05 (*ECOWAS*), fn 158 above).

177See Case C-91/05 (*ECOWAS*), fn 158 above. However see Chapter Five of this thesis.

development objectives say for example in the security-development interface on the one hand, and in the trade-development interface on the other hand.¹⁷⁸ Furthermore, there is an issue regarding coherence in the sequencing of policies functionally. The latter which is less controversial than the former is easier to determine existentially as the Mali case study illustrates.¹⁷⁹ Overall, while Article 21(2) TEU *prima facie* reads new, its practical implications in terms of integrating the objectives of EU external action may not be so new. Illustrative is EU external action objectives towards SSA as elaborated in the Cotonou Agreement.

2.4.2. EU external objectives towards SSA: the Cotonou Agreement and beyond

EU external action objectives in general have been discussed above. With specific reference to EU external action towards SSA, the three evolutionary aims of EU external action discussed above are generally at the centre of EU external objectives and policies towards the region. Indeed, EU external relations has evolved from the successive development cooperation agreements which originally focused solely on trade and development aid.¹⁸⁰ The wide scope of EU external objectives towards SSA is primarily illustrated by the Cotonou Agreement. In general, the Cotonou Agreement was concluded ‘in order to promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.’¹⁸¹ However, at the centre of the partnership is the objective of *reducing and eventually eradicating*

¹⁷⁸See 2.5.1. - 2.5.2. below; and also Chapters Three and Four of this thesis.

¹⁷⁹As discussed in Chapter Six, it is the case that the military dimension of the CSDP was not employed to complement other EU policies and activities in the country when this was necessarily required. This is contrary to the construction of a united whole and hence, contrary to the requirement of coherence (also see in general, Okemuo, G, ‘The EU or France? The CSDP Mission in Mali and the consistency of EU-Africa policy’ [2014] 34 *LLR* 3, 217-240).

¹⁸⁰See 1.1. above, in particular fns 25 and 28; also see 2.2.4. above.

¹⁸¹Cotonou Agreement Article 1.

of poverty consistent with the objectives of sustainable development and the gradual integration of ACP States¹⁸² into the world economy.¹⁸³ In line with developments in the field of international development, the eradication of poverty in the context of sustainable development naturally tied to the Millennium Development Goals (MDGs).¹⁸⁴

As discussed in Chapter Three below, this development cooperation objective of reduction and eventual reduction of poverty had become the key objective of EU development policy by virtue of Article 208 TFEU. However, in contrast to the distinction of development policy and its objectives in the Treaties, the Cotonou Agreement expressly traverses economic and trade objectives,¹⁸⁵ development objectives,¹⁸⁶ and political objectives covering peace building, conflict prevention and resolution.¹⁸⁷ In contrast to trade which was traditionally entwined with development policy, the security objectives were factored into development cooperation following the creation of the CFSP at Maastricht. Without excluding other possible reasons, this was mainly a reaction to the high incidence of political, military and humanitarian crisis in the ACP countries, especially those of SSA. These crisis frustrated much of the development effort made under the previous association agreements. Hence, maintaining the development-focus of the agreement did not discount the introduction of security provisions. Indeed, it is arguable that the security-development nexus requires this. Nevertheless, the introduction of these

¹⁸²Including SSA.

¹⁸³Cotonou Agreement Article 1. It is noteworthy that the core objective of development policy namely the eradication of poverty is entwined in this Article with the objective of EU trade policy namely the gradual integration of ACP States into the world economy (see 3.3.1. below).

¹⁸⁴Article 1 of the Cotonou Agreement as amended by the 2010 revision reflects this. This is in consonance with the obligation on the Union and the Member States to comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations pursuant to Article 208(2) TFEU. However, see 3.2.1. below for the current status of the MDGs, and the current tide in the evolution of EU development policy objectives.

¹⁸⁵Cotonou Agreement Articles 34-54.

¹⁸⁶Cotonou Agreement Articles 19-33 and 55-80.

¹⁸⁷Cotonou Agreement Article 11.

security and political objectives into development cooperation did not affect the CFSP competence of the EU. Hence, in practice, CFSP security and political actions were carried on alongside development cooperation measures in the context of EU external action towards SSA. The same applies to actions under the CSDP which eventually evolved on the back of the CFSP.¹⁸⁸ In general, although trade, security and other wider political objectives are all integral parts of EU development cooperation policy towards SSA under the Cotonou Agreement, the distinct objectives of the different policies also remain integral parts of the equation. Arguably, the retention of the distinct objectives of the distinct policies of external action despite the amalgamation of the latter under Article 21(2) TEU is a further indication of this. In any event, development is at all times at the core of EU external action and objectives towards SSA. And the Treaties require the coherence of other policies with development policy. This renders development policy the benchmark for the analysis of coherence in EU external action in all the dimensions indicated in Chapter One above.¹⁸⁹

¹⁸⁸The Cotonou Agreement also contains a provision for political dialogue including with regards to the political objectives (Article 8), other core objectives, and crosscutting issues like human rights, democracy and the rule of law and good governance (Article 9). However, it is noteworthy that this cross-cutting issues were introduced into the development agreements prior to Maastricht. For example, while the two Yaoundé Conventions and the first three Lomé regimes covered the Part IV policy trio of trade, development aid and investment, by the time of Lomé IV, the objectives and principles of development cooperation were extended to include the active promotion of human rights in the light of the link between human rights and development (for an extensive discussion of this link see for example Alston, P, and Robinson, M, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005); Uvin, P, *Human Rights and Development* (Bloomington: Kumarian, 2004); Sano, H, 'Development and Human Rights: the necessary but partial integration of human rights and development' (2000) 22 *HRQ* 3; for a critical view see for example Galtung, J, *Human Rights in Another Key* (Cambridge: Polity Press, 1994), in particular, p 108; and, Pahuja, S, 'Rights as Regulation: the integration of development and human rights' in Morgan, B, (ed.) *The Intersection of Rights and Regulation* (Aldershot: Ashgate, 2007), Chapter 10); with specific regards to the EU-ACP context under which EU relations with SSA Africa falls, see Bulterman, M, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (Oxford: Hart, 2001). It is noteworthy that these cross-cutting issues are not given to extensive discussion in this thesis but are only mentioned as is necessary.

¹⁸⁹See 1.3. above.

2.5. The legal, political and institutional frameworks for coherence in EU external action towards SSA

The requirement of coherence for EU external action in general, and towards SSA in particular is embedded in a number of frameworks. These could be conveniently divided into legal, political and institutional frameworks. Invariably, these are not mutually exclusive but work together, or at least are aimed at such. This section distils the key legal, political and institutional frameworks for coherence in EU external action in general and towards SSA in particular.

2.5.1. The legal frameworks for coherence in EU external action towards SSA

The key legal frameworks for coherence in EU external action towards SSA are the Treaties and the Cotonou Agreement. These are discussed in turn below, followed by an extrapolation of the legal import of the requirement for coherence in EU external action in general, and towards SSA in particular.

2.5.1.1. The Treaties: between the general requirement for coherence and the requirement for policy coherence for development

The Treaties are the primary legal framework for the requirement of coherence in EU external action in general.¹⁹⁰ However, the key provisions in this regard are the general requirement for coherence under Article 21(3) TEU and Article 7 TFEU on the one hand, and the requirement for the coherence of other policies with development policy under Article 208 TFEU. These shall be analysed in turn.

¹⁹⁰There are many provisions in the Treaties on coherence including as they apply to EU institutions (see 2.5.3. below).

2.5.1.1.1. The general requirement for coherence under Article 21(3) TEU and Article 7 TFEU

Article 21(3) TEU provides that:

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.”

In the same vein, Article 7 TFEU provides that: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.”

Article 21(3) TEU and Article 7 TFEU are both geared towards horizontal coherence across EU external policies and activities in general. No specific policy is targeted. However, it can be argued that this is where their commonality ends. For example, Article 21(3) TEU only requires the Union to ensure coherence between the different policies of external action and its other policies. *A contrario*, Article 7 TFEU requires coherence not only between policies but also between activities. It may seem subtle, but it can be argued that there is a difference between 'policies' as specified in Article 21(3) on the one hand, and between 'policies' and 'activities' as also specified in Article 7 TFEU. The former could refer to the stage of formulation and the coherence of policy instruments. In contrast, the latter holds a connotation of coherence between activities across the different policies. Hence, it implies synergistic sequencing of available policy options. The reference that such coherence shall be ensured, taking all of the Unions's objectives into account, and in accordance with the principle of conferral of powers implies the requirement of coherence in overall output. Despite the subtle difference between the two, Article 21(3) TEU and Article 7 TFEU when read together requires synergy, in other

words the construction of a united whole as discussed in Chapter One.¹⁹¹ However, both provisions are different from the one in Article 208 TFEU which requires policy coherence for development as will now be discussed.

2.5.1.1.2. The specific requirement of coherence of other policies with development policy

By virtue of Article 208 TFEU:

“[...] Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. *The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries* [...]”¹⁹²

It is easy to interpret this simply as a call for the coherence of other EU policies with development cooperation policy as entwined with trade in, say, the Cotonou Agreement which embodies EU trade and development cooperation with SSA. However, it is in particular, an emphatic call for Policy Coherence for Development (PCD)¹⁹³ with a central focus on

¹⁹¹See 1.3. Above.

¹⁹²Ex-Article 178 EC (author’s emphasis); also see Council Decision establishing the organisation and functioning of the European External Action Service [2010] *OJ L*201/30, para 4 of preamble. It is noteworthy that this formulation of the objective of development policy and the one under the Cotonou Agreement (both of which focus on ‘*the reduction and eventual eradication of poverty*’) are weaker than the formulation under Article 21(2)(d) namely the straightforward ‘eradication of poverty.’ However, it is arguable that the conceptual distinction between ‘reduction’ and ‘eradication’ of poverty is not as significant as the interpretation of ‘poverty’ as an antithesis of development (see for example Case C-403/05 and Case C-91/05 (*ECOWAS*), fn 157 above; and more generally Chapter Four of this thesis).

¹⁹³See European Commission, Green Paper, EU development policy in support of inclusive growth and sustainable development: Increasing the impact of EU development policy, COM(2010) 629 final, para 2.6.; For the key instrument on PCD see the Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus on Development’, [2006] *OJ C*46/1 (hereinafter European Consensus); and for other pertinent documents see European Commission, Policy Coherence for Development – Accelerating progress towards attaining the Millennium Development Goals, COM (2005) 134 Final; EU Report on Policy Coherence for Development, COM (2007) 545 Final; Policy Coherence for Development-Establishing the Policy Framework for a whole-of-the-Union approach, COM (2009) 458 Final. For further pertinent discussion of PCD in this Chapter see 2.5.2. below).

development objectives as distinct from the objectives of trade policy.¹⁹⁴ Indeed, beyond a call, it is also a clear commitment to PCD, over and beyond the requirement of coherence between all areas of external action.¹⁹⁵ Nevertheless, this is not to say that the exact meaning of this requirement is clear, or that the exact perimeters of this requirement has been determined. Indeed, the concept of PCD is not only open to interpretation like the concept of coherence,¹⁹⁶ but is particularly a concept in evolution.¹⁹⁷

In terms of practical application in the context of EU external relations law and policy, it has been suggested that the central concern of this requirement is that the needs and interests of developing countries are taken into account when the Union makes and implements its other policies.¹⁹⁸ However, the extent to which the Union is required to do this is difficult to say. And this is even different from the question of whether the requirement is merely concerned with desisting from doing harm or includes ensuring that other policies actively support development objectives.¹⁹⁹ While these could be a reason why policy coherence for development has been

194For the distinction between the two despite the traditional entwining of trade and development in EU external action towards SSA, see Chapters Three and Four of this thesis.

195See Article 21(2) TEU and Article 7 TFEU; and also paragraph 4 of the Preamble to the EEAS Decision (for the texts and analysis of these provisions see 2.5. below). For the imperative of adopting this view in practice and the implications of otherwise see Arts, K, 'Changing interests in EU development cooperation: the impact of EU Membership and advancing integration' in Arts and Dickson, fn 61 above, p 106 – 107.

196See 1.3. above.

197See for example, Dohman, E, 'Towards Policy Coherence for Inclusive and Sustainable Development', Policy Coherence for Development Unit, Office of the Secretary General, OECD, Brussels, 12 June 2014).

198Bretherton, C, and Vogler, J, 'A global actor past its peak?' (2013) 27 *International Relations* 3, 375 – 390; Ga'nzle, S, *et al.* (eds.) *The European Union and global development: an 'enlightened superpower' in the making?* Basingstoke: Palgrave, 2012); Portela, C, and Raube, K, 'The EU polity and foreign policy coherence' (2012) 8 *Journal of Contemporary European Research* 1, 3–20; Thomas, D, C, 'Still punching below its weight? coherence and effectiveness in European Union foreign policy' (2012) 50 *Journal of Common Market Studies* 3, 457–474; Carbone, M, (eds.) *Policy coherence and EU development policy* (London: Routledge, 2009); Gebhard, C, 'Coherence' in Hill and Smith, fn 30 above, p 101–127.

199European Consensus, fn 193 above, para 9; this reflects Article 208 TFEU (ex-Article 177 EC).

considered an impossible requirement to meet²⁰⁰ or even a wishful thinking,²⁰¹ there are other reasons that could foster such conclusion even if an attempt is made to provide further clarification regarding the requirement. For example, the House of Lords Special Committee on the EU explains that the requirement demands that the Union clearly articulate the reasons for acting in a manner which could impact negatively on developing countries in order that counter-arguments may be advanced: 'Commission officials should consider the potential impact of their proposals on developing countries at the outset and be prepared to justify their proposals in public, including any negative impact they might have.'²⁰² Of course, this is clearly onerous and may be difficult, if not impossible for the EU to meet especially in the light of the complex relationship between trade and development.²⁰³ Nevertheless, these technical difficulties does not detract from the Union's commitment to policy coherence for development both in the Treaties and beyond, including in the Cotonou Agreement which specifically applies to EU external action towards SSA.

2.5.1.2. The Cotonou agreement and the requirement of policy coherence for development

In the specific context of EU external action towards SSA, the Cotonou Agreement also bears what could be regarded as an externalised form of the Union's commitment to policy coherence

200Carbone, M, 'Mission impossible: the European Union and policy coherence for development' (2008) 30 *Journal of European Integration* 3, 323–342. This view is of course debatable especially in the light of the fact that PCD is not necessarily a zero-sum game (see for example, Carrera, S, (ed.) *Policy Coherence for Development in the EU Council: Strategies for the Way Forward* (Brussels: CEPS, 2006)).

201Krätke, F, 'Policy Coherence: a sensible idea lost in translation?', *The Guardian*, 11 November, 2013, available at <http://www.theguardian.com/global-development-professionals-network/2013/nov/11/policy-coherence-global-development-zero-sum-game>, accessed 12 January 2015.

202House of Lords Thirty Fourth Report, fn 53 above, para 124.

203For example, there are different concepts of 'development' (see Krätke, fn 201 above, where she also explains with specific regards to trade that trade economists have a different view of what benefits the development of people, countries and economies than diplomats, agronomists or jurists). In the same vein, the concept of poverty lacks a generally accepted definition (Khaliq fn 77 above, 115 above, p 120). This trade-development interface (which is further discussed in Chapters Three and Chapter Four of this thesis) is different from the more or less controversial development-security nexus where one could arguably stand in place of the other as discussed in Chapter Five of this thesis.

for development. Beyond their commitment to pursue the objectives of the partnership,²⁰⁴ Article 12 commits the partners to policy coherence for development. Of course, in so far as the other relevant policies are primarily EU policies and emanate from the EU, it is arguable that the commitment of the partners under Article 12 of Cotonou Agreement does not mean an equal assumption of responsibility.²⁰⁵ Indeed, despite the commitment, the Union acknowledges that its policies other than development policy can support the development priorities of ACP States in line with the development objectives of the Cotonou Agreement. This is in consonance with the requirement of policy coherence for development in Article 208 TFEU. Nonetheless, it is noteworthy that while these may *prima facie* reek of legal commitments, their legal import is another matter.

2.5.1.3. The prospects of an obligation for coherence

The extent of the legal import of the requirements is debatable. Invariably, the Treaties are internal instruments whose provisions are not directed to external parties. However, that an instrument is internal does not mean it is automatically devoid of any external legal imports. Indeed internal instruments can give rise to legitimate expectations.²⁰⁶ At least, in theory, it could be argued that EU internal instruments including the Treaties may result in the creation

²⁰⁴The Cotonou Agreement is expressly named a partnership agreement. However, as already mentioned above, it is an association agreement under EU law.

²⁰⁵Although an association agreement is based on ‘reciprocal rights and obligations’, this does not always mean equivalent rights and obligations (see Case 87/75 *Bresciani*, fn 162 above para 22; also see Case C-12/86 *Demirel*, fn 90 above para 9, where the ECJ confirms that association implies the creation of a special privileged link with a non-Member State). That reciprocity does not always mean equivalent rights and obligations is not peculiar to the EU since this is the position even in international law (see Agwu, F, ‘Reciprocity and its implications in international relations’ in Eze, O, (ed.) *Reciprocity in International Relations* (Lagos: NIIA, 2010), p 31; and also Barker, J, *International law and international relations: International Relations for the 21st Century* (London: Continuum, 2000), p xv.).

²⁰⁶For example, Wessel (fn 144 above, p 301) posits that Common Positions create expectations on the part of third countries.

of expectations on the side of the recipient of EU policies.²⁰⁷ This position finds its basis in the ‘international doctrine on unilateral acts’.²⁰⁸ The obligations in this regard may arise either by evidence of intention to accept obligations or on the basis of the principle of good faith.²⁰⁹ In general, good faith can intervene to bring into being an objective interpretation that is independent of will. For example, in the case of the EU, a combination of the commitment in the Treaties to ensure coherence, and the firm wordings of the European Consensus discussed below could seal the doctrine of good faith. By extension, this could import the doctrine of estoppel based on ‘the simple fact that the law will demand consistency in conduct where the results of inconsistency would be to prejudice another party’.²¹⁰

However, it would be a contentious proposition that the Union and its Member States²¹¹ may be under an obligation to ensure the coherence of EU external action in general, and towards SSA, in particular. While this may be as much the case with the general requirement of coherence across all policies as it is with the requirement of coherence of other objectives with development policy objectives, the reasons behind the contentions may vary.²¹² In fact, it is

²⁰⁷Ibid., p 193.

²⁰⁸Ibid.

²⁰⁹With regards to the latter, the International Court of Justice (ICJ) in the *Nuclear Tests* cases emphasized: “[...] Trust and confidence are inherent in international co-operation. [...] Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected [...]” (ICJ Reports 1974, para 46 (as cited in Wessel, fn 144 above, p 194, in particular n 133)). However, see fn 162 above on the controversial relationship between EU law and international law.

²¹⁰Nollkaemper, A, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (Dordrecht: Martinus Nijhoff), p 214; and Macgibbon, I, ‘Estoppel in International Law’ (1958) *ELR* 468 – 513.

²¹¹As they are indeed jointly responsible for providing “the [EU’s] financial assistance” under the successive association agreements between the EU and SSA (Case C-316/91 *European Parliament v Council (EDF)* [1994] ECR 625).

²¹²And these are apart from issues regarding enforceability such as the standing rules under EU legal order (see for example, Chalmers, D, *et al*, *European Union Law Cases and Materials* (Cambridge University Press, 2nd edn.), Ch 10.), and the unclear relationship between EU law and International law (see for example Case T-85/09 *Kadi v Commissions (Kadi II)* [2010] ECR II-5177; and Eeckhout, P, *EU External Relations Law* (OUP, 2nd edn.), p 405 where it is in fact argued that this relationship is that it is one governed by EU law, with international law only able to permeate the former under the conditions set by the constitutional principles of the EU.

arguable that the latter is not meant to be of any enforceable legal import. This is as much the case for the provision of Article 208 TFEU as the provision of Article 12 of the Cotonou Agreement.²¹³ Indeed, it appears that the EU has explicitly rejected any such enforceable obligation to third parties. For example, the EU has previously explained (significantly in the context of EU external action towards SSA) as follows: 'consistency - in the strict sense of the term, i.e. taking into account the external effects of the other policies, cannot be the subject of an international undertaking by the [Union]. Consistency is a matter for political appraisal in the face of sometimes conflicting objectives.'²¹⁴ From this perspective, it is not surprising that the Union commits itself in the Cotonou Agreement to 'enhance' (as opposed to 'ensure') the coherence of its other policies with a view to attaining the development objectives of the Agreement. The difference between this and the wording of the Treaties which states that the Union shall take into account the objectives of development policy in the implementation of its other policies is noteworthy. It reflects the position of the Commission noted above and indicates a commitment to make efforts to enhance policy coherence for development as opposed to placing an enforceable obligation on the Union to ensure coherence of its other policies with development policy objectives. Indeed while Article 12 provides procedures for possible consultation for the partners where a threat to PCD might arise, it also makes clear that the Union is not bound to accede to the submissions made by its partners regarding the threat to PCD.²¹⁵ This acutely reflects the view that incoherence may sometimes be intended or at least be unavoidable in foreign policy.²¹⁶ Although this view may not rightly apply to the

²¹³In any event, with specific regards to the Cotonou Agreement, as mentioned above (at fn 162), the legal effect of this agreement on the parties is not known.

²¹⁴European Commission, Directorate-General VIII/1 Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century Challenges and options for a new partnership Brussels, 20 November 1996.

²¹⁵This explicit qualification rules out a possible recourse to the dispute settlement mechanism of Article 98 of the Cotonou Agreement.

²¹⁶On coherence sometimes being unavoidable see Craig, P, *Lisbon Treaty, Law, Politics and Treaty Reform* (OUP, 2010), p 423; and on coherence sometimes being intended see Hoebink, P, 'The Coherence of EU Policies:

requirement of coherence as it patterns to synergy in the sequencing of available policy options, the *prima facie* obligations on EU institutions to ensure coherence across EU policies and activities are best appreciated not only in the light of the limits of the law but also in the light of the constraints of politics.²¹⁷ Nevertheless, it is noteworthy that the fact that an obligation may be unenforceable is not tantamount to a negation of its existence.²¹⁸ In any event, it is arguable that the coherence of EU external action remains a political imperative and a political requirement as will now be discussed especially with regards to policy coherence for development.

2.5.2. The European Consensus²¹⁹ - a political framework for PCD in EU external action

The key extra-legal framework for coherence in EU external action is the European Consensus.²²⁰ This instrument which predates the Lisbon Treaty initially committed the EU to

Perspectives from the North and the South' (2005) Commissioned Study, Center for International Development Issues Nijmegen, Brussels, p 19, where he also explains that coherence can also be political or economic based on conflicting interests and complexity of issues. The remedy he proposes for these includes tolerating incoherence, mitigation, compensation, additional/flanking policy.

217Significantly, the involvement of the Member States in the context of relevant policies remains crucial to the question of coherence. This would be the case with the CFSP and the CSDP for which the EU does not have exclusive competence. When concerted external action is mounted under these two policy dimensions, Article 4(3) TEU (ex-Article 10 EC) imposes at the very least a duty of close cooperation between the Member States and the EU institutions—not only in order to facilitate the achievement of EC tasks, but also ‘to ensure the coherence and consistency of the action and [the Union’s] international representation’ (C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para 60; as confirmed in C-433/03 *Commission v Germany* [2005] ECR I-06985, para 66 and more recently in C-246/07 *Commission v Sweden* [2010] ECR I-3317, para 75). The limits of the law in regulating the Member States in this regard is discussed in Chapter Five and Chapter Six of this thesis.

218However, see Peers, S, ‘The CJEU enhances the EU’s role as an external actor’, a blog entry in EU Law Analysis blog, 11 June 2014, available at <http://eulawanalysis.blogspot.co.uk/2014/06/the-cjeu-enhances-eus-role-as-external.html>, accessed 01 July 2014, where he notes that a legal commitment does not always imply a concrete obligation. This is in line with the view that the weight accorded to compliance with the legal obligation in an agreement is important (Holdgaard, fn 111 above, p 303).

219See European Consensus, fn 193 above (it is not a legal instrument and is duly published in “Series C” of the Journal which is for Information and Notices).

220As discussed in Chapter One of this thesis, two other related instruments namely the JAES and the Strategy for the Sahel are important instruments for coherence in EU external action towards SSA. However, they are not frameworks for coherence in the same way as the prescriptive requirements of the Treaties, and the aspirational requirements of the Cotonou Agreement and the PCD. Rather the JAES and the Strategy for the Sahel are respectively more like regional implementing instruments for coherence in EU external action towards SSA in general, and the Sahel sub-region of SSA in particular. As an umbrella framework, the JAES merits a separate Chapter for its analysis. It is discussed in Chapter Seven of this thesis. In contrast, the Sahel Strategy as a sub-

taking action to advance policy coherence for development in a number of areas namely Trade, Environment, Climate change, Security, Agriculture, Fisheries, Social dimension of globalisation, employment and decent work, Migration, Research and innovation, Information Society, Transport and Energy.²²¹ However, a subsequent review identified five areas of proactive engagement and focus in the immediate future namely trade and finance, climate change, food security, migration and security.²²² In contrast to the Treaty provisions on coherence discussed above, the PCD as spelt out in the European Consensus clearly portends only an aspirational goal.²²³ In this way, it may be similar to the unenforceable provisions of the Treaties as discussed above.²²⁴ Overall, whether it is an impossible requirement to meet,²²⁵ indeterminate or merely aspirational, PCD as spelt out in the European Consensus, the Treaties and the Cotonou Agreement, is undeniably a demonstration of the Union's commitment to policy coherence for development as a priority. Similar to the general requirement of coherence,²²⁶ PCD is recognised as essential for the credibility of the EU as a global actor.²²⁷

2.5.3. Institutional frameworks for coherence in EU external action with special reference to SSA

Article 13(2) TEU provides that each institution shall act within the limits of the powers

regional implementing framework pertinent to Mali is analysed as necessary within the context of the distinct policies discussed in the subsequent Chapters of this thesis.

²²¹European Consensus, fn 193 above, para 35.

²²²Council Conclusions on Policy Coherence for Development, 18 November 2009, doc. 16079/09. Of course, not all the areas identified in any of the two instances are investigated in this thesis (see 1.2. above).

²²³The most recent DAC Peer Review of the European Union OECD 2012 affirms that PCD remains a political priority for the whole of the EU (see 'European Union', Organisation for Economic Co-operation and Development (OECD), Development Assistance Review (DAC) Peer Review, 2012, p 16). This is not to deny the potency of politically binding obligations. See for example, Flynn, N, and Peart, N, 'The Role of Political Agreement in a Legally Binding Outcome' (European Capacity Building Initiative, 2010, available at <http://www.eurocapacity.org/downloads/TheRoleofPoliticalAgreementInALegallyBindingOutcome.pdf>, accessed 17 April, 2015). It is also not to deny affirm that 'non-enforceable' equates to a complete lack of persuasive force.

²²⁴See 2.5.1.3. above.

²²⁵See p 37 above.

²²⁶As discussed at 1.1. above.

²²⁷Council of the European Union, Council conclusions on Policy Coherence for Development 3166th Foreign Affairs Council meeting Brussels, 14 May 2012, para 1.

conferred on it in the Treaties and in conformity with the procedures, conditions and objectives set out in them.²²⁸ Institutional competences apply to the principle of coherence in EU external relations law.²²⁹ This section provides an overview of the institutional framework for coherence in EU external action as a background for the discussion of their roles within the context of different policies as discussed in the subsequent Chapters of this thesis.²³⁰ The relevant institutions in this regard are the European Council,²³¹ the Council,²³² the European Commission (the Commission),²³³ the European Parliament (EP),²³⁴ and the ECJ.²³⁵ These institutions are jointly responsible for coherence pursuant to Article 13(1) TEU.²³⁶ This is different from the key responsibility for coherence under Article 21(3) which is placed on the Council and the Commission, assisted by the HR/VP. Although the HR/VP and the EEAS in her service are not listed as institutions under the Treaties,²³⁷ they are also introduced in this

228This is also settled law (Case C-70/88 *Parliament v Council* [1990] ECR I-2041, especially para 21; and Case C-316/91 (*EDF*) fn 211 above, especially para 11 and 12).

229Article 13(1) TEU.

230Of course, this is not to counteract the tacit flexibility and pragmatism which prevails in the context of EU external action as discussed at 2.3.1. above. With regards to the institutional dimension, it is particularly noteworthy that the different evolutionary history of different EU policies imports with them different institutional frameworks that came about at different periods and developed along different tracks with their own integration logics (Vanhoonacker, S, 'The Institutional Framework' in Hill and Smith, fn 30 above, p 68). In practice, EU institutions often activate hybrid procedures to bypass the procedural constraints imposed by the Treaties (see Sicurelli, D, *The European Union's Africa Policies* (Surrey: Ashgate, 2010), p 159). Sometimes, the EU institutions resort to Inter Institutional Agreements (IIAs) for the flexible and pragmatic arrangements as has most recently been codified at Lisbon by virtue of Article 17(1) TEU. For more on the practice of IIAs prior to Lisbon see for example, Hummer, W, 'From 'Interinstitutional Agreements' to 'Interinstitutional Agencies/Offices'?' [2007] 13 *ELJ* 1, p 47; and Monar, J, 'Interinstitutional Agreements: the phenomenon and its new dynamics after Maastricht' [1994] 31 *CML Rev* 693; also for agreements in EU law in general, see Hofmann, H, 'Agreements in EU law' [2006] 31 *ELR* 6, p 800). The role of the institutions or lack thereof in policy making and implementation in the context of the different policies are discussed in the relevant subsequent Chapters of this thesis covering the different policies.

2312.5.3.1. below.

2322.5.3.2. below.

2332.5.3.3. below.

2342.5.3.4. below.

2352.5.3.7. below.

236Article 13(1) TEU (ex-Article 3 TEU). Other institutions listed are the European Central Bank and the Court of Auditors. However, their analysis is outside the scope of this thesis. Furthermore, it is noteworthy that this list is a slight change from the pre-Lisbon position when neither the ex-European Investment Bank nor the European Council was accorded the status of 'institution'. Beyond this joint responsibility, there are also other individual responsibilities for coherence on some of the institutions as discussed in the relevant sub-sections below.

237See Article 13 TEU. The EEAS was established in 2010 pursuant to Article 27(3) TEU (see Council Decision establishing the organisation and functioning of the European External Action Service, [2010] *OJ*

section.²³⁸

2.5.3.1. The European Council

The European Council was established as an informal body in 1975 for the purposes of ensuring coherence between the nascent EPC and other EU external action under the ex-Community.²³⁹ However, it only became an official EU institution at Lisbon.²⁴⁰ While it is charged with providing the EU with the necessary impetus for its development and defining the general political guidelines thereof,²⁴¹ the Treaties do not expressly assign any formal role to this institution with regards to the contemporary requirement of coherence. Nevertheless, it would generally have further importance for coherence especially at the strategic level due to its position and influence as the apex EU institution.²⁴² This, and the fact that it has the responsibility for identifying the strategic interests and objectives of the Union both under the CFSP and non-CFSP,²⁴³ as well as the fact that the HR/VP attends the meetings of the European Council post-Lisbon²⁴⁴ could aid coherence. However, this will ultimately depend on the political will of EU Member States who they represent.

L201/30, (hereinafter EEAS Decision), para 1 of Preamble. On the special position of the EEAS, see 2.5.3.6. below.

238After all, they are the core post-Lisbon bodies for enhancing coherence (see 2.5.3.5. and 2.5.3.6. below).

239See 2.3. above.

240The European Council is composed principally of the Heads of State and Government of EU Member States (Article 15(2) TEU). However, its President (often elected) and the President of the Commission are also official Members of this institution (Article 15(2) TEU). Traditionally, it makes the Treaties which are the 'primary laws' of the EU (a function for which it is known as the Masters of the Treaties), but has no legislative powers whatsoever. The input of the European Council which takes the form of a political decision only has legal force once it has been adopted by the Council according to the decision-making procedures (Hayes-Renshaw, F, and Wallace, H, *The Council of the European Union* (Basingstoke: Macmillan, 1996), p 164).

241Article 13 TEU. It has specific roles in relation to the CFSP and CSDP (see Chapters Five and Six of this thesis respectively).

242Gilbert, M, *Surpassing Realism – The Politics of European Integration since 1945* (Lanham: Rowman & Littlefield, 2003), p 219. In this position, the European Council settles issues outstanding from discussions at the lower levels.

243Article 22(1) TEU 2nd indent.

244Article 15(2) TEU.

2.5.3.2. The Council

Generally described as the ‘pre-eminent legislative authority’, the Council exercises joint legislative and budgetary function with the EP,²⁴⁵ and also carries out policy-making and coordinating functions.²⁴⁶ The Council is comprised of several configurations of the Ministers of each EU Member State.²⁴⁷ The exact configuration of the Council depends on the topic or policy area it is discussing.²⁴⁸ However, with regards to external action, there is a special arrangement. Pre-Lisbon, the General Affairs and External Relations Council (GAERC) comprising of Ministers of Foreign Affairs of Member States played the ‘Senior Council’ and dealt with external action.²⁴⁹ Post-Lisbon, there is now a specific Foreign Affairs Council (FAC).²⁵⁰ In general, the FAC elaborates the Union’s external action on the basis of strategic guidelines laid down by the European Council. It is composed of foreign ministers from EU Member States, and depending on agenda brings together trade ministers (CCP), defence ministers (CSDP) and development ministers (development cooperation). With regards to coherence, in general, the Council as an institution shares the responsibility for ensuring the coherence of EU external action with the HR/VP and the Commission pursuant to Article 21(3) TEU. This is imperative in so far as it functions as a “*Doppelorganschaft*”,²⁵¹ operating across

245Article 14(1) and Article 16(1) TEU, and also Article 314 TFEU; on the EP see 2.5.3.4. below.

246Article 16(1) TEU; there is also a provision for the possibility of a Council action *sans* a proposal from the Commission or the HR.

247Presently 10 configurations (see 'Council Configurations' available at <http://www.consilium.europa.eu/en/council-eu/configurations/>, accessed 12 December 2014). By virtue of Article 236 TFEU, the European Council can decide on the list of other Council formations.

248Any of the Council's 10 configurations can adopt an act that falls under the remit of another configuration. Therefore, with any legislative act the Council adopts no mention is made of the configuration (see 'Council Configurations' available at <http://www.consilium.europa.eu/en/council-eu/configurations/>, accessed 12 December 2014).

249There was no legal basis for this.

250Article 16(6) TEU. The FAC is the second part of a divided GAERC, with the other part being the General Affairs Council (GAC). In contrast to the FAC, the GAC deals with institutional and administrative issues. In this regard, it *inter alia* prepares meetings of the European Council, in liaison with the President of the European Council and the Commission. Article 16 (6) TEU.

251Bono, R, G, 'Some Reflections on the CFSP Legal Order' (2006) 43 *CMLRev.*, p 337-394, at 378 where he explains same: “i.e. two-fold organic nature”.

the CFSP and non-CFSP external action in terms of decision making. However, the role of the Council in ensuring coherence as part of Article 21(3) triad would mainly be limited to the policy making level similar to the position of the European Council. Although both the GAC and the FAC are tasked with ensuring coherence,²⁵² there is every indication that the task of ensuring coherence of EU external action at the level of policy formulation falls on the FAC.²⁵³ In this regard, the aim of ensuring coherence across the different Council configurations could be fostered by the Chairing role of the HR/VP across the different policy-specific FAC.²⁵⁴ It is noteworthy that the Council also has special Committees and Working Groups that help to prepare its work.²⁵⁵ Some of these are policy-specific and are mentioned in the relevant Chapters on the case studies as may be necessary. However, the discussion in this Chapter will not be complete without a mention of the Committee of Permanent Representatives (COREPER).²⁵⁶ This is designated as the main forum for ensuring policy coherence for development.²⁵⁷ Otherwise, the role of the Council and its preparatory bodies in the different

252Ibid; and Article 2 Council Rules of Procedure annexed to Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU) [2009] *OJ L325/35* (hereinafter Council Rules of Procedure).

253Article 16 (6) TEU; and Council of the European Union, Foreign Affairs, available at <http://www.consilium.europa.eu/policies/council-configurations/foreign-affairs?lang=en>, accessed 27 December 2011. In contrast, the GAC's task of ensuring coherence 'in the work of the different Council configurations' will be limited to the institutional and the administrative issues for which it is responsible (see fn 250 above).

254See 2.5.3.5. below. However, see Chapter Four of this thesis for the specificity of the Trade Council.

255For a list of the Council Working Groups, Working Parties and Special Committees see the Council Rules of Procedure, fn 252 above. Of course, these are different from the General Secretariat of the Council (GSC) - a body of staff responsible for assisting the European Council and the Council (including the Working Groups and Committees). It helps organise and ensure the coherence of the Council's work and the implementation of its 18-month programme (see 'General Secretariat of the Council', available at <http://www.consilium.europa.eu/en/general-secretariat/>, accessed 15 February 2016; and for a detailed analysis of the CGS see Wessel, fn 144 above, p 85-88; and in general Hayes-Renshaw and Wallace, fn 240 above, Chapter 4).

256Article 16(7) TEU: 'A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council'; also see Article 240TFEU; Article 19(1) Council Rules of Procedure (fn 252 above). COREPER is composed of two bodies (Rules of Procedure Art.19 para 2 sentence 1): Members of COREPER II are Ambassadors of the Member States in Brussels, while those of COREPER I are their deputies.

257Council Conclusions on Integrating Development Concerns in Council Decision-making of 17 October 2006 (doc. 14072/06). A designation that is significant in so far as this Committee is arguably the highest Council preparatory body which 'preparation' sometimes turns out as the final Council Decision (that is except for matters of high politics which is generally left to the Council or sometimes the Political and Security Committee (PSC) especially in the high politics fields of the CFSP and CSDP as discussed in Chapter Five and Six of this thesis respectively. Otherwise, the decisions of COREPER are often confirmed by the Council even though they are non-

EU external policies are pertinently discussed in the subsequent Chapters of this thesis.

2.5.3.3. The Commission

Recently described as the 29th Member State at the table,²⁵⁸ the Commission represents and upholds the interests of the EU as a whole.²⁵⁹ It has a traditional right of initiative with regards to internal EU affairs post as pre-Lisbon.²⁶⁰ But this does not apply globally across EU external policies.²⁶¹ With regards to ensuring coherence in external action, the Commission takes very much centre stage. It specifically shares the responsibility for ensuring coherence of external action with the Council and the HR/VP.²⁶² Of course how these play out in practice is another matter in the light of its more supranational orientation as opposed to the arguably more intergovernmental orientation of the Council, the HR/VP, and the EEAS.²⁶³ Nevertheless, this is not to deny the potentials of institutional coordination possibly based on effective negotiation or 'productive dialogue'.²⁶⁴ Similar to the Council, the Commission is not monolith. Within the

binding guidelines. These are adopted as 'A Point' (not open to debate, leaving any issue for which an agreement has not been reached by COREPER as 'B Point' on the agenda (subject to debate). Similar to the Council, COREPER can also set up Special Committees and Working Groups itself).

258See Wessel, R, and Van Vooren B, *EU External Relations Law, Text, Cases and Materials* (Cambridge University Press, 2014) p 375. It is completely independent and neither seeks nor takes instructions from any Government or other institution, body, office or entity. Also, more generally known as the 'Guardian of the Treaties', the Commission is tasked with ensuring the application of the Treaties, and overseeing the application of EU law under the control of the ECJ (Article 17(1) TEU).

259Article 17(1) TEU.

260Article 17(3) TEU. In terms of institutional prerogative, the Commission has the traditional exclusive right of 'initiative' in relation to legislation and regulation. Article 17(2) TEU.

261See the analysis of the role of the Commission in 5.4. and 6.4. below.

262By virtue of Article 21(3) TEU.

263See for example 3.4., 4.4. and 5.4. below. However, as mentioned above, It is noteworthy that in the context of EU external action towards SSA, the Commission especially have a much longer presence than any other EU institution (see 3.4. – 3.5. below), and is in fact known for its influence in shaping EU-Africa policies (Sicurelli, D, 'Framing security and development in the EU Pillar structure. How the views of the European Commission affect EU-Africa policy', [2008] 30 *JEI* 2, p 217-234; also see Hewitt, A, and Whiteman, K, 'The Commission and development policy: bureaucratic politics in EU aid – from the Lomé leap forward to the difficulties of adapting to the twenty-first century' in Arts and Dickson, fn 61 above, p 133).

264Cruz, J, 'Legal Pluralism and Institutional Disobedience in the European Union' in Avbelj, M, and Komarek, J, (ed.) *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012), p 254; also see European Commission, EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission (HRVP) Statement on EEAS Review, European Parliament/Strasbourg 12 June 2013, SPEECH/13/530.

Commission, responsibilities are dispersed over different Directorate Generals (DGs).²⁶⁵ The requirement of coherence also applies in this regard pursuant to Article 17(6)(b) TEU.²⁶⁶ This is particularly important in the context of EU external action towards SSA where two strong DG's namely DG Trade and DG DEVCO²⁶⁷ operate side by side.²⁶⁸

2.5.3.4. The European Parliament (EP)

The EP jointly exercises legislative and budgetary functions with the Council.²⁶⁹ With specific regards to coherence of external action, the EP is not assigned any specific formal role beyond the general responsibility on the institutions to ensure coherence.²⁷⁰ However, this is not to say that its contribution in this regard is less important.²⁷¹ For one, the EP could be relevant for enhancing PCD by virtue of its power to 'assent' or 'consent' to international agreements.²⁷² Indeed, the EP most recently created a standing Rapporteur for PCD which is aimed at pointing out potential incoherencies in EU policies, and ensuring that the effects of new European legislation on developing countries are taken into account during the law-making process.²⁷³

265A current list of the Commission's DGs is available at http://ec.europa.eu/about/ds_en.htm, accessed 15 June 2015.

266The responsibility for ensuring coherence in this context rests on the President of the Commission. In fact, the Commission has established special mechanisms for coherence (see Appendix 7: Commission Mechanisms for Coherence, attached to the House of Lords Thirty-Fourth Report, fn 53 above).

267DG Trade is self-explanatory in a way that DG DEVCO is not. Pre Lisbon, there was a DG DEV (formerly DG VIII) responsible for policy formulation and programming for the ACP countries and therefore SSA countries. It also coordinated political relations with the ACP countries, the African Union (AU) and regional organisations. But, there was also DG AIDCO (Europeaid), in charge of the implementation of programmes covering the whole of the project cycle except for programming. The post-Lisbon DG DEVCO is an incorporation of the former DG DEV and AIDCO.

268See the analysis of the role of the Commission especially in 3.4. and 4.4. below.

269While it has always been an EU institution, its powers have only developed incrementally through the successive Treaty amendments.

270Under Article 13 TEU.

271The HR/VP who is the key post-Lisbon institution for coherence recognises this (see SPEECH/13/530 fn 264 above).

272This is one of the major role of the EP in EU external action as couched in Article 218(6)(a) TFEU.

273DAC Peer Review of the European Union, OECD 2012, 223 above, p 16. The EP has various Committees for the different fields of EU external policies. These Committee instruct legislative proposals through the adoption of reports, propose amendments to Plenary and appoint a negotiation team to conduct negotiations with the Council on EU legislation. They also adopt own-initiative reports, organise hearings with experts and scrutinise the other

The EP's involvement or lack of it in the distinct EU external policies is pertinently discussed in the relevant Chapters of this thesis along with the other institutions.

2.5.3.5. The HR/VP

The HR/VP is not listed as an EU institution under Article 13(1) TEU. Nevertheless, it is arguably more or less an EU institution in so far as it is a member of the Commission where she also serves as Vice-President.²⁷⁴ In any event, she holds the core post-Lisbon position for ensuring coherence across the spectrum of EU external action.²⁷⁵ Indeed, even though she shares the responsibility for ensuring coherence with the Council and the Commission under Article 21(3) TEU, she is the one formerly charged with the responsibility of coordinating the interactions between the relevant institutions to enhance coherence. This is the reason behind her 'triple-hat' as the chair of the FAC, Vice-President of the Commission (VP) and High Representative for the CFSP and CSDP. Having said that, it is noteworthy that her role as VP does not bring her completely under the Commission's procedure as her role at any time would depend on the hat on her head.²⁷⁶ Similarly, her role as the Chair of FAC does not imply membership of the Council in general, or FAC in particular. In contrast to the pre-Lisbon High

EU bodies and institutions (see List of Committees available at <http://www.europarl.europa.eu/committees/en/parliamentary-committees.html>, accessed 7 November 2014). The most pertinent being the International Trade Committee (INTA), The Development Committee (DEVE) and the Foreign Affairs Committee (AFET) which is divided into a Human Rights Committee (DROI) and a Security and Defence Committee (SEDE).

²⁷⁴Article 18(4).

²⁷⁵See for example, 'Europe and the World', Speech by High Representative Catherine Ashton, EU High Representative for Foreign Affairs and Security Policy and Vice President of the Commission, Speech 10/378, Megaron "The Athens Concert Hall", Athens, 8 July 2010, p 3, available at http://europa.eu/rapid/press-release_SPEECH-10-378_en.htm?locale=en, accessed 15 January 2014; also see Piris, J, *The Lisbon Treaty – A Legal and Political Analysis* (Cambridge University Press, 2010), p 248; and Mirschberger, M, 'Who leads the EU? Competences, rivalry and a role for the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, the Presidency of the Council and the President of the European Commission' in Trybus and Rubini, fn 26 above, p 18-30.

²⁷⁶According to the Treaties, the HR/VP is only bound by Commission procedure only when she is exercising her Commission-related responsibilities (Article 18 (4) TEU).

Representative for the CFSP and the Secretary General of the Council,²⁷⁷ the HR/VP has no decision-making power within the Council but rather acts upon the mandate given to her. In fulfilling her 'institutional bridging' mandate, the HR/VP is supported by the EEAS.²⁷⁸

2.5.3.6. The EEAS

The EEAS is a 'functionally autonomous body' of the EU under the authority of the HR/VP.²⁷⁹ In supporting the HR/VP in fulfilling her mandate with regards to coherence, one of the aims behind the creation of the EEAS was to bring the disparate policies together.²⁸⁰ In doing this, it is particularly required to seek to ensure that other areas of EU external action respect the objectives of the Union's development policy in line with Article 208 TFEU and the European Consensus²⁸¹ as discussed above.²⁸²

Arguably, it is *de facto*, if not *de jure* an EU institution.²⁸³ De Baere and Wessel²⁸⁴ posits that

277Who was also a member of the Council.

278At all times, the discussion of the role and function of the EEAS cannot be fully separated from a discussion of the HR/VP as the two are intertwined under Article 2(3) TEU.

279See EEAS Decision, fn 236 above, preamble 1.

280See Article 18(4) TEU; and also the various Articles of the EEAS Decision (fn 236 above); indeed as Cardwell rightly notes, apart from the creation of the new role of the HR/VP and the EEAS, the role of different EU institutions within the distinct policies was not fundamentally changed at Lisbon (Cardwell, P, (ed.) *EU External Relations Law and Policy in the Post-Lisbon Era* (The Hague: TMC Asser/Springer, 2011) p 113).

281EEAS Decision, fn 236 above, Preamble, para 4.

282See 2.5.1.1.2.; 2.5.1.2. and 2.5.2. above.

283For example, see para 8 of the Preamble to the EEAS Decision: 'For matters relating to its staff, the EEAS should be treated as an *institution* within the meaning of the Staff Regulations and the Conditions of Employment of Other Servants of those Communities ('CEOS'). Furthermore, the EEAS is listed amongst EU institutions and bodies by the EU at http://europa.eu/about-eu/institutions-bodies/eeas/index_en.htm, accessed 19 June 2014; also see Mark, F, 'The European External Action Service: a new institutional framework for EU development cooperation', German Development Institute, *Discussion Paper* 15/2010). Indeed, the relevant departments and functions of the Council Secretariat and the Commission were transferred *en bloc* to the EEAS (see the annex to EEAS Decision, fn 236 above). However, see Missiroli, A, 'The New Foreign policy System after Lisbon: A Work in Progress' (2010) 15 *EFAR* rev. 427-452 where he posits that the EEAS can best be described as *sui generis* for want of a better categorisation).

284See De Baere, G, and Wessel, R, 'EU law and the EEAS: of complex competences and constitutional consequences', Draft paper – presented at the conference The EU's Diplomatic System: post-Westphalia and the European External Action Service, Europe House, London, UK, 19 November 2013, available at <http://www.utwente.nl/mb/pa/research/wessel/wesselconf11.pdf>, accessed 30 May 2014.

the ‘indeterminate status’ of the EEAS²⁸⁵ and the open-ended nature of its mandate limits its potentials to effectively perform its tasks in relation to coherence.²⁸⁶ However, it is arguable that this is not significantly different in import from the already accepted flexible and pragmatic approach to institutional procedures as mentioned above.²⁸⁷ Indeed, perhaps of arguably more significance is the fact that the EEAS as indeed the HR/VP, does not have a final say over most of the EU’s external relations tools. With specific reference to SSA, the Managing Director of EEAS Africa recently called to mind the concept of *Staatenverbund* by pointing out that the EEAS acts as the *servant* of the Member States, not the master.²⁸⁸ Arguably, this would apply to all EU institutions.²⁸⁹ In this regard, the potential impact of the EEAS as the HR/VP to aid institutional coordination for coherence would depend not only on the political will of traditional EU institutions, but also the Member States, as the case may be.²⁹⁰ Indeed, where there is political will, a productive dialogue would lead to effective institutional coordination. However, whether inter-institutional dialogue can successfully navigate all the inter-policy interactions that implicate coherence is another matter.²⁹¹ In any event, the relevant provisions

285Ibid., p 2, where they also explain that this indeterminate status is “the result of a compromise between those wanting the EEAS to be an essentially intergovernmental body close to or part of the Council and those preferring it to be close to or part of the Commission.”

286Ibid: “A study commissioned by the European Parliament found that most stakeholders now agree that the *sui generis* positioning of the EEAS was a mistake: the Commission perceives the construction as a loss of power that ought to be regained or protected, while the Member States feel the priorities set out by the EEAS often compete with their own national priorities. The fact that the EEAS is not an institution proper therefore makes it significantly more difficult for it fully to perform its tasks.”; also see Wouters, J, *et al.*, *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities* (Brussels: European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, 2013), p 25, for the reference to the detrimental impact of the open ended nature of the mandate of the EEAS on the latter’s functioning.

287See fn 230 above.

288‘A new Framework for European Relations with Africa’, Speech delivered by Nick Westcott, Managing Director Africa EEAS, to the EUISS conference on EU-Africa foreign policy after Lisbon, 18 October 2011, available at http://eeas.europa.eu/top_stories/2011/181011_en.htm, accessed 15 March 2014.

289Including the ‘supranational’ Commission (see fn 174 above).

290See SPEECH/13/530, fn 264 above; also see Cruz 264.

291Illustrative is the interaction between trade and development (see Chapter Three and Chapter Four of this thesis). Also, further illustrative is the interaction between the CFSP and the CSDP on the one hand, and other EU policies on the other hand, *vis-a-vis* the sequencing of available policy options (see in particular Chapter Five and Chapter Six of this thesis for illustration with Mali case study).

on the mandate of the EEAS are pertinently discussed in the context of the distinct policies analysed in this thesis.²⁹² The EU Delegations are also covered as may be relevant.²⁹³

2.5.3.7. The ECJ

Post as pre-Lisbon, the ECJ has the responsibility to ensure that the law is observed in the interpretation and application of the Treaties.²⁹⁴ It rules on actions brought by a Member State, an institution or a natural or legal person, and in other cases provided for in the Treaties.²⁹⁵ With specific regards to coherence, the Court has no express jurisdiction. However, this does not mean a total lack of jurisdiction in this regard. For example, it is arguable that Articles 21(3) TEU and 7 TFEU on coherence are not outside the jurisdiction of the ECJ in so far as they are not expressly excluded from this jurisdiction.²⁹⁶ Indeed, Elsuwege suggests that it is.²⁹⁷ And so does Kronenberger.²⁹⁸ This is not surprising especially in the light of 'the creative jurisprudence' of the ECJ.²⁹⁹ However, the question of who will take recourse is another matter. For example, Kronenberger notes that 'In the end, recourse to the Court on such an issue might actually mean that the institutions principally entrusted with the duty of ensuring such consistency, have failed to do so', and further expresses doubt regarding whether an EU institution will take another to

²⁹²See Chapters Three to Six of this thesis.

²⁹³The EU Delegations is a part of the EEAS (Council Regulation (EU) No 370/2011 amending regulation (EC) No 215/2008 on the Financial Regulations Applicable to the 10th European Development Fund, as regards the European External Action Service [2011] *O J L*102/1, para 4); also see *Délégation de l'Union européenne en République du Mali* http://eeas.europa.eu/delegations/mali/index_fr.htm for the role of the EU Delegation to Mali.

²⁹⁴Article 19 TEU.

²⁹⁵*Ibid.*

²⁹⁶The only jurisdictional limitations as far as the Treaties are concerned are Articles 24, 275 and 276 TFEU ruling out the Court's direct jurisdiction over the CFSP. It follows that all other provisions of the Treaties arguably fall under the Court's jurisdiction.

²⁹⁷Von Elsuwege, P, 'EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance Between Delimitation and Consistency' (2010) 47 *CMLRev.*, 987–1019.

²⁹⁸Kronenberger, V, 'Coherence and Consistency of the EU's action in international crisis management: the role of the European Court of Justice' in Blockmans, S, (ed.), *The European Union and Crisis Management: Policy and Legal Aspects* (The Hague: TMC Asser, 2008), p 210-211.

²⁹⁹See implied competence discussed above.

Court simply based on an issue bordering on coherence.³⁰⁰

With specific regards to the requirement of policy coherence for development which is arguably indeterminate and political in nature,³⁰¹ it is noteworthy that the ECJ has previously been hesitant to rule on it, choosing to leave the matter to the political institutions of the Union.³⁰² Suffice it to state that the issues surrounding policy coherence for development are complex and difficult, if not impossible to negotiate.³⁰³ It follows that even though the post-Lisbon increased references to it at Treaty level would appear to elevate the concept of coherence to standing as one of the central regulatory standards of EU external relations law, the efficacy of such a regulatory standard is yet to be determined. In fact, it could well be conceded that there is a general lack of institutional capacity for enforcing the requirement of coherence in EU external action as there is for the legal enforcement of the EU common interest in external relations in general.³⁰⁴ Attendantly, it is easy to posit that the Union is so committed to

300Kronenberger, fn 298 above, p 211. This will not only be odd but may actually be impossible in the light of the expected common understanding of the dearth of EU resources and the limitations posed by the complexity of the institutional provisions of EU external relations law. In fact, Mold and Page are of the opinion that the coherence rhetoric may outstrip resources, performance and legal provisions, and in this regard call for the requirement to be toned down (see Andrew Mold and Sheila Page, 'The Evolution of EU Development Policy – Enlargement and a Changing World' in Mold, A, (ed.) *EU Development Policy in a Changing World: Challenges for the 21st Century* (Amsterdam University Press, 2007), p 11 – 28).

301Also see the other limitations discussed above.

302This was in relation to trade (see Chapter Four of this thesis). It is likely that the Court will take similar approach in other policy contexts as they relate to policy coherence for development. Indeed, it is doubtful that the Court will venture into policy coherence for development as it relates to the CFSP and the CSDP. This is because of the intense nexus between security and development wherein one could conceptually stand for the other conveniently (see Chapter Five and Chapter Six of this thesis). Arguably, it is these that Vanhoonacker refers to when she explains that increased coordination mechanisms within and between EU institutions are no guarantee that the interplay between the different foreign policy subsystems results in a coherent foreign policy (see Vanhoonacker, S, and Neuhold, C, 'Dynamics of Institutional Cooperation in the European Union: Dimensions and Effects', (2015) 19 *EIOP* 1, p 1–15).

303DAC Peer Review of the European Union, OECD 2012, fn 223 above, p 17 (this brings to mind Carbone's position that PCD is impossible (see p 68 above, fn 200 inclusive); also see Hoebink, fn 216 above, p 12 where he explains that a causal link between policy and policy results is often hard to determine even in political science literature on policy evaluation).

304Wouters *et al*, fn 286 above, p 20; also see the relevant sections of the subsequent Chapters on specific EU external policies towards SSA. This is understandable in the field of foreign policy which generally eludes the grasp of law, and in the light of the potential difficulties with enforcing the principle of coherence as discussed above.

coherence that it engages in a moral rhetoric with a view to inspiring the relevant protagonists.³⁰⁵ However, the problem with this, is that it may be a dangerous level of commitment in that the Union may ultimately be setting itself up for failure in the light of the glaring legal, political and even resource limitations. Nevertheless, the Union's performance has to be measured against its own commitments.³⁰⁶ This is the line towed in this thesis in its investigation of the coherence of EU external action towards SSA.

2.6. Conclusion

From the foregoing, the EU is not only committed to the coherence of its external action in general, but in particular, to policy coherence for development in its external action towards SSA. However, although these are clearly illustrated by the strengthening of the requirement of coherence at Lisbon, including by the creation of the HR/VP and the EEAS to enhance coherence, there are legal and political limitations to their potential enforceability. Invariably, the coherence of EU external action towards SSA would not rest solely on the HR/VP and the EEAS. This is as much the case for the requirement of policy coherence for development, as for the general requirement of coherence with regards to synergy in the sequencing of available policy options. The reason for this is that they are only bridging institutions that would have to depend on the political will of the relevant traditional EU institutions, and sometimes the Member States to enhance coherence depending on the policy in question. However, these may only be determined by a contextual investigation. It is to this that the subsequent analysis turns to, starting from the generally agreed core of EU external action towards SSA namely development policy, using Mali as case study.

305Khaliq fn 77 above, p 260.

306Or utterances (ibid).

Chapter Three

3.0. EU development policy towards SSA – financially aiding poverty eradication, sustainable and human development

3.1. Introduction

As discussed in Chapter Two of this thesis, the EU's primary approach to SSA outside the CFSP is based on the entwined trade and development cooperation policy framed under the successive association agreements signed in the context of EU external relations with SSA.¹ In contrast to the CFSP external action towards the region, this approach is based on a contractual partnership under the relevant successive association agreements. However, although trade and development are entwined under this framework of association as a type of development assistance,² EU development policy is *de jure* and *de facto* distinct from EU trade policy which is discussed in the next Chapter. Primarily illustrative in this regard is the historical institutional distinction between the two,³ the case law of the Court of Justice of the European Union (ECJ),⁴ and also the relevant provisions of the Treaties for these different policies.⁵ Significantly, this has been widely embraced by EU legal scholars⁶ even before the post-Lisbon development in

¹See the successive agreements between the EU and the countries of SSA cited in Chapter One of this thesis at 1.0., especially fns 29 and 31; also see for example, Bartels, L, 'The Trade and Development Policy of the European Union', (2007) 18 *EJIL* 4, 715-716 (reprinted in Cremona, M, (ed.), *Developments in EU External Relations Law* (OUP, 2008), p 128-171; and also Orbie, J, 'EU Trade and Development Policy: On Pyramids and Spaghetti Bowls' (2007) *LX Studia Diplomatica* 1. While the Treaties refer to this policy as development cooperation policy, the analysis resorts to 'development policy' and 'development cooperation' interchangeably.

²MacLeod, *et al*, *The External Relations of the European Union Communities* (Oxford: Clarendon Place, 1996), p 272

³This is most visible in the EU Commission (see the analysis in Chapter Four of this thesis at 4.4.

⁴See for example, Case 45/86 *Commission v Council (GSP)* [1987] ECR 1493; and *Opinion 1/78 (Re the draft Agreement on Natural Rubber)* [1979] ECR 2871.

⁵See 3.2.3. below and Chapter Four (at 4.3.2.) including with regards to the most recent illustration at Lisbon.

⁶See for example Peers, S, 'EC Frameworks of International Relations: Co-operation, Partnership and Association' in Dashwood, A, and Hillion, C, *The General Law of EC External Relations* (London: Sweet & Maxwell), p 170, where he expressly acknowledging the well-known division between commercial policy and development policy; also see Ravenhill, J, 'Back to the Nest? Europe's Relations with the African, Caribbean, and Pacific Group of Countries' in Aggarwal, V, and Fogarty, E, (ed.) *EU Trade Strategies: Between Regionalism and Globalism* (London: Palgrave, 2004), 118 – 147; and MacLeod, fn 2 above, p 272.

this aspect of EU external relations law and policies.⁷

Nevertheless, it is noteworthy this 'separation' thesis is neither to deny that the entwining of trade policy with development policy in the relevant instruments in the context of EU external relations with SSA is not easy to disentangle,⁸ nor is it to deny that trade policy could contribute to development policy objectives.⁹ Furthermore, while it can be argued that the entwining of trade policy and development policy is in recognition of the potential contribution of trade to development,¹⁰ this is not to say that the entwining of trade and development in the context of EU external relation with SSA was originally framed in terms of policy coherence for development. As discussed in Chapter Two, the issue of coherence in EU external action evolved on the heels of the evolution of the political dimension of EU external action.¹¹ Coherence was not considered an issue when development and trade were the only key external policies.¹² In the light of the instrumentality of trade to development, and the EU's trade-driven poverty alleviation,¹³ it is arguable that it may have been taken for granted that trade was already compliant with development objectives. Of course, this is until the concerns leading to the adoption of the European Consensus for development which includes trade as one of the policy fields that is required to be coherent with development objectives.¹⁴

⁷See fn 6 above.

⁸Indeed, they have been analysed as entwined (see for example Bartels, fn 1 above; and Orbie, fn 1 above; also see Macleod, fn 2 above, who discusses it both as Development and Assistance Policies on the one hand (p 18), and simply as Association as a Special Type of Development Assistance, on the other hand (p 380).

⁹See the GSP case, fn 4 above; and *Opinion 1/78*, fn 4 above; also see for example, Bartels, fn 1 above; Orbie, fn 1 above; and Khaliq, U, *Ethical Dimensions of the Foreign Policy of the European Union A Legal Appraisal* (Cambridge University Press, 2008), especially 130-139; and in general, Chapter Four of this thesis.

¹⁰*Ibid.*; also see Khaliq, fn 9 above, p 123; and also p 130 where he states that trade has far greater potential than aid as an instrument to alleviate poverty (citing OECD, *The Development Dimension of Trade* (Paris: OECD, 2002), and OECD, *Strengthening Trade Capacity for Development* (Paris: OECD, 2002)).

¹¹See Chapter Two of this thesis (at 2.2.3; 2.2.4.1.; and 2.3.2.).

¹²*Ibid.*

¹³See Khaliq, fn 9 above, p 130; and in general Chapter Four of this thesis.

¹⁴See Chapter Two of this thesis at 2.5.2. above.

The purpose of this Chapter is to analyse EU development policy towards SSA as a distinct field of EU external action towards the region. This means ultimately separating it from trade which it is historically and legally entwined with in this context.¹⁵ The main reason for discussing development policy first, is not only because development is at the heart of EU external relations towards SSA,¹⁶ but also because of the requirement of policy coherence for development.¹⁷ As discussed in Chapter Two, over and above the requirement of coherence of EU external policies in general, policy coherence for development is about the coherence of other policies with development objectives.¹⁸

In this regard, the Chapter provides the crucial benchmark that will facilitate comparison with the selected relevant strand(s) of EU external action towards SSA with a view to determining their coherence, including in the light of the requirement of policy coherence for development. In doing this, the Chapter discusses the instruments and institutional dynamics of EU development policy towards the region, it especially highlights the post-Lisbon institutional developments aimed at enhancing coherence.¹⁹

In general, it is submitted that the post-Lisbon law and practice render more plausible the argument that EU development policy towards SSA has always been separable from EU Trade

¹⁵Although development and security are also interlinked, development policy and security policy have always remained distinct policies albeit not without an overlap in their scopes (see Chapters Five and Six of this thesis).

¹⁶See for example Chapter Two of this thesis (at 2.4.2.); and also 3.2. below.

¹⁷See Chapter Two (at 2.5.2.).

¹⁸ Ibid.

¹⁹These will enable a subsequent analysis of coherence across all EU policies towards the region, albeit with a specific focus on the requirement of policy coherence for development as discussed in Chapters One and Two respectively. As discussed in Chapter One, the analysis of coherence in the context of this thesis centres on the examination of synergy between the norms, instruments and institutions towards the construction of a united whole including in overall output. However, as the analysis in Chapter Two illustrates, there is a special requirement for policy coherence for development. Therefore, while this thesis investigates the coherence of EU external policies towards SSA in general, it does this with an understanding of the particular requirement regarding development objectives.

Policy towards the region despite the historical intertwining of the two in the successive association agreements that regulates EU external relations with SSA. Using Mali as a case study, the Chapter illustrates that EU development cooperation including in the context of EU external action towards SSA revolves mainly around development assistance by means of financial aid for strategies aimed at poverty eradication and sustainable development.²⁰ In this regard, the analysis further illustrates that although there is a central objective of EU development policy in general, the objectives and strategic priorities of EU development policy towards SSA centre on the distinct development needs and interests of the relevant recipient sub-geographic regions and countries of SSA.²¹ This is either mutually agreed or unilaterally determined by the EU, but in a process distinct from the procedure for the determination of EU trade policy towards the region as discussed elsewhere in this thesis.²² Against this background, it is posited that the specific strategic objectives as stipulated in the relevant region or country-specific instruments are not only relevant for a better understanding of the dynamics of EU development policy in this context, but are also as relevant to the determination of coherence as the general objectives of EU development policy as spelt out in the Treaties. It all depends on the policy against which policy coherence for development is being assessed.²³ The involvement of the post-Lisbon body for coherence namely, the European External Action Service (EEAS)²⁴ in the procedure for development policy is highlighted.

²⁰See 3.3.2. to 3.5. below. In the meantime, it is noteworthy that development cooperation is not concerned with financial assistance only, but may also include technical assistance (Martenczuk, B, 'Community Cooperation Policy and Conflict Prevention' in Kronenberger, V, and Wouters, J, *The European Union and Conflict Prevention: Policy and Legal Aspects* (The Hague: TMC Asser Press, 2004) p 191.

²¹See 3.4. below; and for the relevant sub-geographic regions of SSA, see Annex III attached to this thesis.

²²See Chapter Four of this thesis (at 4.4.).

²³For example, while the general objective of development policy may be at the heart of the discussion of policy coherence for development as it relates to trade, it may not be as relevant as the specific strategic objectives in the discussion of policy coherence for development as it relates to the CFSP and the CSDP.

²⁴Council Decision establishing the organisation and functioning of the European External Action Service, [2010] OJ L201/30, (hereinafter EEAS Decision); also see Chapter Two of this thesis at 2.5.3.6. above.

As an implicit benchmark for the analysis of other strands of EU external action towards SSA discussed in the subsequent Chapters of this thesis, this Chapter also sets the structure to be followed in the subsequent Chapters of this thesis. In this regard, the Chapter is divided into four sections. The first section analyses the legal basis and the scope of objectives of this EU development policy with special reference to SSA. The second section provides a pertinent analysis of the institutional dimension of this policy. As discussed in Chapter Two, the interaction between these legal and institutional dimensions is relevant to the coherence discourse. Furthermore, in so far as the thesis is first and foremost a legal analysis, the legal-institutional analysis provides a pertinent background for the subsequent analysis of the instruments of EU development policy towards SSA in the third section. The fourth and final section centres on Mali as a case study. Since the institutional dimension is globally applicable to the region, the Mali case study focuses mainly on the instruments and objectives albeit not to the total exclusion of the institutional dimension.²⁵

3.2. The legal basis and scope of objectives of EU development policy with special reference to SSA

The aim of this section is to discuss the legal basis and scope of objectives of EU development policy. This is a pertinent background for the subsequent analysis of its institutional structure and the evolution of the instruments and dynamics of EU development policy towards SSA. The legal basis is most imperative in so far as the thesis is first and foremost a legal analysis. Furthermore, as explained in Chapter Two, the legal basis for each EU policy is the first indication of the scope and objectives of the policy both of which are important to the coherence

²⁵These are only mentioned where necessary.

discourse because of the interaction between the policies. However, prior to the discussion of the legal basis and scope of objectives of EU development policy with special reference to SSA, it is imperative to provide a pertinent contextual background of this policy. This enables a deeper insight into the background of development policy over and above the general background to EU external relations law and policies provided in Chapter Two.

3.2.1. EU development policy towards SSA and coherence: a pertinent contextual background

Opinions vary regarding which EU external policy is the EU's external anchor.²⁶ With specific regards to development policy, not only has it been suggested that 'development rightly finds its place at the head and heart of EU external action worldwide',²⁷ it has also been officially affirmed that '[...] Development policy is at the heart of the EU's relations with all developing countries [...]'.²⁸ Historically, the evolution of EU trade policy as an integral part of the Common Commercial Policy (CCP) did not occur without recognition of the development concerns of the EU's trade partners.²⁹ This is particularly so in the context of EU external relations with SSA where EU external action arguably began.³⁰

EU development policy towards SSA emerged on the heels of EU trade policy.³¹ However, in

²⁶ See Chapter Four to Chapter Six of this thesis.

²⁷ Commissioner Andris Piebalgs, speech to European Parliament Development Committee, SPEECH/10/288, 2 June 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/288&type=HTML>, accessed 27 May 2012.

²⁸ Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus on Development', [2006] *OJ* C46/1 (hereinafter the European Consensus), para 1, 2nd indent.

²⁹ See Chapter Two of this thesis (at 2.2.3.).

³⁰ *ibid.*

³¹ See Chapter Two of this thesis (at 2.2.4.); and also for example, Article 1 of each of the successive agreements from Yaoundé I to Lomé IV cited in Chapter One of this thesis at 1.0., particularly in fns 29 and 31; also see Abass, A, 'EU Crisis Management in Africa: Progress, Problems and Prospects' in Blockmans, S, (ed.), *The European*

contrast to the latter which evolved as an integral part of the CCP, the former did not have any clear status in the Treaties initially. It has been suggested that the earliest two attempts to establish EU development policy within the framework of the Treaties were resisted by the Member States.³² According to this view the Member States considered development policy a particularly influential 'foreign policy' mandate that should not be 'lost' to the EU.³³ Indeed, even after the Member States gave their approval, development policy was left outside the Treaties.³⁴ However, this does not mean that it was certainly completely outside the EU's normative and institutional framework. To this effect, Hoebink argues that development cooperation was present in the Treaty of Rome, but only in the form of 'associationism'.³⁵ While this could find support in Macleod's concept of 'association as a type of development assistance', it runs contrary to Schrijver's position that the period between Part IV and the Maastricht Treaty (which codified development policy) is a period of 'legal gap'.³⁶ Similar to Schrijver's position is the view expressed by Grille that EU development policy evolved in an *ad hoc* manner.³⁷

Union and Crisis Management: Policy and Legal Aspects (The Hague: TMC Asser, 2008), p 332, who posits that the successive agreements 'were largely motivated by trade.'; also see Obasanjo, O, 'The need for an African response' in Zartman, W, (ed.) *Europe and Africa: the new phase* (Boulder: Lynne Rienner, 1993), p 181, where he posits that the ties were born of trade and investment, and strengthened by aid.

32See McMahon, J, *The Development Cooperation Policy of the European Community* (the Hague, 1998), p 5; these earliest two attempts to establish a Community development policy were a Commission memorandum on a Community policy for development co-operation, Summary SEC (71) 2700 final, 27 July 1971 (Bulletin of the European Communities, Supplement 5/71), and a subsequent Memorandum from the Commission on a Community policy on development cooperation: Programme for initial actions, SEC (72) 320 final, 2 February 1972 (both documents are available at <http://aei.pitt.edu/>, accessed 04 August 2012).

33See McMahon, fn 32 above; also see Chapter One of this thesis (at 1.1. above, and particularly fn 3) on the view that all EU external policies are foreign policies.

34See Development aid: 'Fresco' of Community action tomorrow, Communication from the Commission to the Council, COM (74) 1728 final, 30 October 1974, Bulletin of the European Communities, Supplement 8/74) available at <http://aei.pitt.edu/>, accessed 04 August 2012.

35See Hoebink, P, 'Evaluating Maastricht's Triple C: an introduction to the development paragraphs of the Treaty on the European Union and suggestions for its evaluation' in Hoebink, P, (ed.), *The Treaty of Maastricht and Europe's Development Co-operation* (Amsterdam: Aksant, 2005), p 2.

36Schrijver, N, 'When will the New Emperor wear his clothes? The efforts of the European union towards a common development cooperation policy' in Bulterman, M, *et al* (eds.) *Views of European Law from the mountain* (Kluwer Law International) p 382.

37See Grille, E, *The European Community and the Developing Countries* (Cambridge University Press, 1993), p 337.

Indeed, it remains an open question whether the Yaoundé Conventions³⁸ were a continuation of association under Part IV of the Treaty of Rome, or entirely a new regime under the provision on association agreement.³⁹ As discussed in the previous Chapter, the latter is only a framework for agreements not a substantive legal basis for any specific policy.

In any event, the practice of EU development policy was legally affirmed when the ECJ ruled that EU competence in the field of development aid is not exclusive, but rather shared with the Member States.⁴⁰ This is generally regarded as the first express indication that the EU and the Member States shared competence for development policy. But whether, it would also be regarded as the first express indication of the EU's competence for development policy is another question especially in the light of Hoebink's argument.⁴¹ In any event, it is perhaps also significant that the implication of the shared competence in this context is that Member States are entitled to enter into commitments themselves vis-à-vis non-Member States, either collectively or individually, or even jointly with the EU.⁴² In entering such commitments with or without the EU, the Member States could draw on the rules applicable to EU expenditure

38The first two post-independent association agreements between the Member States and European Community on the one hand and the newly independent countries of SSA on the other (see Chapter One of this thesis, at 1.0., in particular fn 28).

39As enshrined in Article 217 TFEU (ex-Article 310) which was then Article 238 EEC. For the debate on this point see Okigbo, P, *Africa and the Common Market* (London: Longman, 1967), p 47; Werner, F, 'The Association Agreements of the European Communities: A Comparative Analysis' (1965)19 *IO* 2, p 226; also see in general Zartman, W, *The Politics of Trade Negotiations between Africa and the European Economic Community* (New Jersey: Princeton University Press, 1971); and Djamson, E, *The Dynamics of Euro-African Co-operation* (The Hague: Martinus Nijhoff, 1976), p 71, who contrastingly suggests that the Yaoundé Conventions may have been conceived under Article 352 TFEU (ex-Article 308 EC; then Article 235 EEC) discussed in 2.3.2. above especially fn 119 ; also see Martenczuk, B, 'From Lomé to Cotonou: the ACP-EC Partnership Agreement in a Legal Perspective', [2000] 5 *EFAR* 461, p 463 where he suggests that the use of the provision on association agreement only started with the Lomé regimes which succeeded the Yaoundé Conventions. Having said that, it is noteworthy that the question of legal basis for EU trade and development policy towards SSA is further discussed in Section 3.1 below.

40See Case C-268/94 *Portugal v Council (India)* [1996] ECR I-6177; Joined Cases C-181/91 and C-248/91 *European Parliament v Council and Commission (Bangladesh)* [1993] E.C.R. 3685; and Case C-316/91 *European Parliament v Council (EDF)* [1994] E.C.R. 625).

41However, see Hoebink's argument in the previous page.

42Ibid., para 26. This was a reaffirmation of the Court's judgement in Case C-181/91 and C-248/91 (fn 40 above).

and could associate the EU institutions with the procedure thus set up.⁴³ Furthermore, at all times, any question regarding delineation of competence for development aid is an internal question for the EU and its Member States. It can be argued that this *Tous pour un, un pour tous*⁴⁴ arrangement holds the interpretative implication that it may not always be concluded with certainty whether EU development aid can rightly be classified as an integral part of EU development policy or be regarded as just a collective development aid policy of the Member States.⁴⁵ However, it is noteworthy that *Parliament v Council* established that both the EU and the Member States are jointly responsible for providing the relevant aid in the framework of EU development policy. This renders obsolete the question of delineation of competence. Overall, the question of the primary source of EU development aid is immaterial in this context in so far as the answer would not detract from the categorisation of the title and topic of this Chapter.⁴⁶

With specific regards to coherence, it can be argued that while these *sui generis* arrangement between the EU and the Members States may have addressed issues relating to vertical coherence,⁴⁷ the latter is a different matter from horizontal coherence with which this thesis is concerned.⁴⁸ Indeed, as mentioned earlier, it was not until the codification of EU development

43Ibid., para 41.

44See Hillion, C, '*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union' in Cremona, fn 1 above.

45It can be taken for granted that most, if not all EU Member States have bilateral development policy (see for example, Westcott, N, 'A new framework of European relations with Africa', Speech delivered by Nick Westcott, Managing Director, Africa EEAS, to the EUISS Conference on EU-Africa Foreign Policy after Lisbon, 18 October, 2011; and in general, Hoebink, P, (ed.) *European Development Cooperation: In Between the Local and the Global* (Amsterdam University Press, 2010). Pre Lisbon, the EU competence for development policy was complimentary to the development policies of the Member States pursuant to ex-Article 177 EC. However, in the light of the Lisbon amendments, EU development policy and the development policy of the Member States complement and reinforce each other pursuant to Article 208(1) TFEU (ex-Article 177 EC as amended).

46Also see Martenczuk, fn 20 above, p 202.

47Between EU development policy and the development policies of the Member States.

48The question of vertical coherence is outside the scope of this thesis as indicated in Chapter One.

policy at Maastricht⁴⁹ that the requirement of coherence was also codified. Even then, the requirement of policy coherence for development,⁵⁰ as is the general requirement of horizontal coherence of EU policies,⁵¹ centred mainly on the distinction and the interaction between the CFSP and non-CFSP external policies of the EU.⁵² Suffice it to state that this was prior to the evolution of Policy Coherence for Development (PCD)⁵³ and the eventual intense highlight on the need to take account of the objectives of development policy in the making and implementing of other EU policies including trade policy. As mentioned above, it may have been taken for granted that trade was coherent with development objectives in the light of the trade-driven poverty alleviation especially in the context of EU external relations with SSA. Perhaps it was, even if only to an extent.⁵⁴ In any event, this development cooperation was one in which trade and development was entwined under the context of association as a type of development assistance. However, if at all times trade had a legal basis in the Treaties within the context of the CCP, while same cannot certainly be said for the development policy, it could be argued that any reference to trade and development cooperation policy is not (or should not be) a reference to a policy, but a reference to a combination of trade policy and development cooperation policy, even though the former could contribute to development.⁵⁵

49130u of Maastricht Treaty (subsequently amended by ex-Article 177 EC).

50Ex-Article 178 EC This was Article 130v of the Maastricht Treaty.

51Ex-Article 3 TEU. This was previously Article C of the Maastricht Treaty.

52These applied to EU external relations with SSA even though this aspect of EU external relations was excluded from the procedural dimension of development cooperation policy as enshrined in the Treaties at Maastricht. The procedural dimension of development cooperation policy as enshrined in ex-Article 179 EC (this was Article 130w of the Maastricht Treaty) did not 'affect cooperation with the African, Caribbean and Pacific countries in the framework of the ACP-EC Convention' pursuant to ex-Article 179(3) EC. It is arguable that this was in recognition of the special procedure of development cooperation policy as a type of development assistance under the framework of association agreements (see 3.3.1. below). In general, this development assistance is also funded by a special financial mechanism which is outside EU budget (see the European Development Fund (EDF) mentioned in Chapter Two of this thesis (at 2.2.4.), and more generally 3.4. below).

53See Chapter Two of this thesis (at 2.5.2).

54See in general Chapter Four of this thesis.

55The practice of development cooperation without an express legal competence would be contrary to the principle of conferred powers as discussed in Chapter Two (at 2.3.1). Nevertheless, as indicated in that same Chapter, flexibility and pragmatism is embraced in EU external relations law and policies.

The objectives of EU development policy are discussed below.⁵⁶ However, it is important to note at this stage that no attempt is made at any stage of this analysis to define ‘development’ as a concept. Indeed, development is a concept that eludes any clear and specific definition. In general, it could be regarded as a set of values as opposed to a clearly defined operation.⁵⁷ In the context of this analysis, the concentration on EU development cooperation policy in general and towards SSA in particular is limited to the relevant provisions of the Treaties, unilateral EU instruments, association or partnership agreements signed in the context of EU external action towards SSA, and the interpretation of these in case law.⁵⁸ In so far as the investigation of coherence in the context of EU external action towards SSA is concerned, it is the construction of development policy in EU external relations law and policies that matters. However, the latter has evolved flexibly over time within the context of political change in both the EU and the global political environment.⁵⁹ As discussed below, it is a development policy that has embraced related constructions in international instruments such as sustainable development and the Millennium Development Goals (MDGs).⁶⁰ In fact, the MDG's guided the Union's

⁵⁶See 3.2.3. below.

⁵⁷Henkin, L, *The Age of Rights* (New York: Columbia University Press, 1990), p 191.

⁵⁸This does not mean that all the instruments of EU development cooperation are discussed in this Chapter. Indeed, the legal, policy and financial instruments of EU development cooperation are too numerous to be covered in the limited confines of this thesis. In this regard, instruments are discussed to the extent of their relevance and sufficiency to answering the research question. As explained in Chapter One, the limited focus in the selection of instruments is in no way purported to undermine the significance of other instruments not covered in this thesis (see Chapter One of this thesis, at 1.5.).

⁵⁹Mold, A, 'The Evolution of EU Development policy – Enlargement and a Changing World' in Mold, A, *EU Development Policy in a Changing World: Challenges for the 21st Century* (Amsterdam University Press, 2007), p 11. Whether this development policy of the EU was the origin of international development assistance in general as evolved post World War II, or whether the reverse is the case is not clear. In any event, international development assistance was only officially institutionalised in 1961 with the creation of the Organisation for Economic Cooperation and Development (OECD) Development Assistance Committee (DAC) as it evolved from an earlier consultation forum for donor counties (see Fuhrer, H, *The Story of Official Development Assistance* (Paris, 1996), p 4; (See Fuhrer, p 8).

⁶⁰Millennium Development Goals adopted by the United Nations General Assembly on 8 September 2000. The MDGs expires at the end of 2015, and a post-2015 agenda has been agreed On 25th September 2015 (on this date, 193 Members of the United Nations, with 154 Heads of States & Governments present, formally adopted the new Development Framework “Transforming Our World: the 2030 Agenda for Sustainable Development” (hereinafter Sustainable Development Goals). This new framework comprises of 17 Goals and 169 Targets to empower people the world over within the next 15 years). For more on Sustainable Development Goals, see <http://www.globalgoals.org>, accessed 10 October, 2015; and for the EU's involvement in the negotiation leading

policy on development cooperation.⁶¹ Even the 'new EU development policy' as laid out in the Agenda for Change policy instrument⁶² includes action on the MDGs. As explained earlier,⁶³ this is not surprising because the treaties require that “The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations” pursuant to Article 208(2) TFEU.⁶⁴

Noticeably, the more ambitious the EU development policy becomes, the more ambitious the EU's commitment to the requirement of coherence of other policies with development objectives. For example, several years after the European Consensus,⁶⁵ and other subsequent relevant instruments,⁶⁶ the Council's Conclusion on the Agenda for Change commits the EU to

to this see 'Millennium Development Goals: what after 2015?', available at http://ec.europa.eu/europeaid/policies/european-development-policy/what-after-2015_en, accessed 15 August 2015; and for a more academic-focused discussion on the global construction of EU development policy see Hollis, S, 'The Global Construction of EU Development Policy' (2014) 36 *JEI* 6, p 567-583.

61Internal Agreement between the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on the financing of European Union aid under the multiannual financial framework for the period 2014 to 2020, in accordance with the ACP-EU Partnership Agreement, and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies (hereinafter Internal Agreement for the 11th EDF) [2013] *OJ L210/1*, Preamble paragraph 8.

62See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Increasing the impact of EU Development Policy: an Agenda for Change, COM(2011) 637 final (hereinafter 'Agenda for Change'); also see the European External Action Service and European Commission, Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) – 2014-2020, (hereinafter Instructions for the Programming of the 11th EDF or DCI), Brussels 15 May 2012, p 1 for a specific reference to the Agenda for Change as a 'new EU development policy'. The 'new EU development policy' is said to be a response to crises and profound changes in the international context in recent years which have forced the EU to sharpen its analysis, streamline its policy agenda and reinforce its operational instruments in support of inclusive and sustainable development.

63See Chapter Two of this thesis at 2.4.2., particularly fn 187.

64Ex-Article 177 EC, sub-paragraph 3. Of course, this is not a confirmation of the coherence of EU development policy with relevant international instruments. The coherence of EU development policy with relevant international instruments is a different question entirely, and one outside the scope of this thesis.

65See the European Consensus fn 28 above.

66For the history of the evolution of policy coherence for development in the EU before and after the European Consensus see for example Egenhoffer, C, *et al*, *Policy Coherence for Development in the EU Council: Strategies for the Way Forward* (Brussels: CEPS, 2006), p 6-8.

a more pro-active integration of development objectives into EU policies and external action.⁶⁷

The latter is a further affirmation of a commitment to a proactive engagement and focus in the immediate future on five areas, including trade and security which are investigated in this thesis.⁶⁸ In the same vein, the financing instrument for development cooperation for the period 2014-2020 reiterates that while striving for overall coherence of the Union's external action in accordance with Article 21 TEU, the Union is to ensure policy coherence for development as required by Article 208 TFEU.⁶⁹ This is a replication of the fourth recital of the EEAS Decision:

“[...] the Union’s external cooperation programme [...] should [...] fulfill the objectives for external action as set out in Article 21 TEU in particular in paragraph (2)(d) thereof, and [...] respect the objectives of the Union’s development policy in line with Article 208 TFEU”.

Article 21(2)(d) TEU provides that one of the objectives of external action is to “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty”. Hence, even the EEAS which is established to enhance coherence across EU external action in general, is specifically required to respect the objectives of development policy while doing the former.⁷⁰ Of course, the success or the extent of the success in achieving this requirement can only be determined by an investigation of the relevant norms, instruments and institutional dimensions of the other EU external policies discussed in this thesis on the one hand, and their coherence with their development counterparts discussed

⁶⁷See The European Council, Council conclusions ‘Increasing the Impact of EU Development Policy: an Agenda for Change’ 3166th Foreign Affairs Council meeting Brussels, 14 May 2012, especially para 22.

⁶⁸Council Conclusions on Policy Coherence for Development, 18 November 2009, doc. 16079/09; also see Chapter Two of this thesis (at 2.5.2.). The other three areas are climate change, food security and migration (while finance is also included, it is actually entwined with trade).

⁶⁹Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Financing Instrument for Development Cooperation for the period 2014-2020 (hereinafter DCI) [2014] *OJ* L77/44, Preamble, para 16. This regulation replaces Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a Financing Instrument for Development Cooperation [2006] (*OJ* L378/41).

⁷⁰See more extensively Chapter Two of this thesis (at 2.5.3.6.).

in this Chapter on the other hand.⁷¹ The objectives, instruments and institutional dimension of EU development cooperation policy will provide the benchmark for this as analysed below.

3.2.2. The legal basis for EU development cooperation policy with special reference to SSA

In contrast to other aspects of EU external relations, the legal basis for EU development cooperation policy towards SSA is not a matter of simple reference to a Treaty provision. As mentioned at the beginning of this Chapter, the Union's interaction with SSA outside the CFSP framework is primarily governed by association agreements which are in substance trade and development agreements. This is one of the areas where the complexity and flexibility of foreign policy⁷² casts a grey shadow. EU external action is not devoid of such complexity and flexibility. In contrast, it is arguable that these are rife in EU external relations law and policies⁷³ in the context of a *Staatenverbund*.⁷⁴ With specific regards to the matter at hand, the discussion above reveals that EU development cooperation policy began prior to the Maastricht Treaty when the ex-Community Treaties contained no powers expressly relating to development co-operation. This was in contrast to trade which had an express legal basis in the Treaties right from the inception, but was entwined with development policy under the successive association agreements which are the norm in the context of EU external relations with SSA. As discussed in Chapter Two, the legal basis for the successive association agreements is usually the Treaty provision on association agreements presently Article 217

⁷¹Nevertheless, it is noteworthy that this aspect of coherence may not be certainly determinable (see Chapter Two of this thesis at 2.5.3.).

⁷²By its nature, foreign policy is in general resistant to 'static' legal rules due to the need for pragmatic responses to the ever evolving foreign policy needs of nation states (see for example, Hurd, D, 'Developing the Common Foreign and Security Policy' (1994) 70 *IA* 3, p 422; and De Baere, G, *Constitutional Principle of EU External Relations* (OUP, 2008), p 1, where he argues that foreign policy escapes any grasp of law).

⁷³On the complexity of EU external relations law and policies see for example Chapter One of this thesis at 1.6.).

⁷⁴On the *Staatenverbund* status of the EU, see Chapter Two of this thesis at 2.3.1., especially fn 97.

TFEU.⁷⁵ The nature of EU competence for association agreements⁷⁶ is not clear-cut – a situation left unchanged at Lisbon. As also discussed in Chapter Two, association agreements can cover the entire subject matter of the Treaties,⁷⁷ and even fields not already covered in the treaties.⁷⁸ However, the entwining of development policy and a core key policy like trade (which is arguably the primary provision of these agreements) means that these agreements could rightly be considered instruments of trade policy with development components.⁷⁹ This would not detract from the requirement that trade policy shall take account of development objectives. For to see it as a detraction of this requirement would also mean that an institutional arrangement that puts EU trade institutions in policy making in the context of association agreements automatically runs contrary to that requirement.⁸⁰ But, there is no doubt that the latter is not the case in so far as taking into account the objectives of development policy is a question of political will at the highest EU level. This remains the case even if meeting that requirement may only be a matter of extent.⁸¹ Furthermore, although the Generalised System of Preferences (GSPs)⁸² pursue a development policy aim, the ECJ held in the *GSP* case that this did not detract from the fact that they are trade instruments.

Having said that, it is noteworthy that these successive agreements signed in the context of EU

⁷⁵Ex-Article 310 EC.

⁷⁶That is whether it is shared or exclusive (or even *sui generis* – see for example the CFSP discussed in Chapter Five of this thesis).

⁷⁷Illustrative is the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part (hereinafter the Cotonou Agreement) (2000) *OJ L317/3* (First Revision (2005) *OJ L287/1*; Second Revision (2010) *OJ L287/3*). As will be recalled from Chapter One, this has been referred to as 'a spaghetti bowl' due to its wide scope of coverage (see Chapter One of this thesis at 1.0., in particular fn 32).

⁷⁸Such as the pre-Maastricht EU development cooperation policy which was not provided for in the Treaties but has been at the core of the successive agreements between EU and SSA (however see Hoebink's argument at 3.2.1. above especially as it relates to fn 35).

⁷⁹See in general Chapter Four of this thesis.

⁸⁰*Ibid.*

⁸¹*Ibid.*

⁸²For analysis of the GSP, see Chapter Four of this thesis (especially at 4.3.3).

external relations with SSA could legitimately also be regarded as primarily development policy instruments with trade components especially in the light of the objectives of the Cotonou Agreement.⁸³ Indeed, the objectives of association as discussed in Chapter Two and also mentioned above equally reflect a development orientation in the first instance. In particular, as mentioned earlier, Macleod categorises association in the context of EU external relations with SSA as 'association as a type of development assistance'.⁸⁴ In the case law of the ECJ, in order to qualify as a development cooperation agreement for the purposes of Article 130y of the Treaty, an agreement must pursue the objectives referred to in Article 208 TFEU.⁸⁵ The fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterization of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses. However, this is only provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation.⁸⁶ Based on this, the difficult question becomes whether the trade provisions in the association agreements signed in the context of EU external relations with SSA imposes extensive obligations concerning trade that in fact constitute objectives distinct from those of development cooperation.⁸⁷ This is a controversial point⁸⁸ especially bearing in mind that the objectives of development cooperation policy as provided in ex-Article 177 includes the integration of the developing countries into the world economy – an objective that primarily relates to trade and could potentially be incoherent with the key development objective of

⁸³See 3.3.2 below.

⁸⁴Macleod, fn 2 above; also see Hoebink's argument at 3.2.1. above.

⁸⁵Ex-Article 177 (Case C-268/94 *Portugal v Council* (fn 40 above), para 37).

⁸⁶ Ibid., para 37, citing to this effect, *Opinion I/78* fn 1 above, para 56.

⁸⁷In this case poverty reduction, and in the long term eradication.

⁸⁸See Chapter Four of this thesis. As for other provisions on other fields, they are clearly ancillary to the principal objectives of the Agreement and are not therefore concerned with objectives separable from that of development cooperation and are, moreover, merely declaratory in nature (see Case C-268/94, fn 40 above, para 69).

poverty alleviation.⁸⁹ Unfortunately, the rules on legal basis do not help in this case.⁹⁰

In any event, the implication of either of the two different interpretations is recognition of the co-existence of two key policies within the context.⁹¹ The fact that there is a difference in the nature of EU competences for trade and development respectively does not affect this conclusion.⁹² In practice, this issue of differences in the nature of EU competence for development policy and trade policy is circumvented in the context of association by the legal phenomenon of mixity.⁹³ Also known as 'mixed competence',⁹⁴ the practice of mixed agreements enables the EU and the Member States to negotiate, conclude and implement an international agreement whose subject matter falls within the competences of both without any precise delimitation of the undertakings entered into by the EU and by the Member States.

⁸⁹See Martenczuk, fn 39 above, p 467.

⁹⁰See 2.3.3. above. However, in the India Agreement where development is also combined with trade both the provision on development cooperation competence and the Treaty provision on external trade competence are used and cited as the legal basis for the agreement (Council Decision 94/578/EC of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development [1994] *OJ* L223/23). The Council argued that the commercial aspect of the Agreement finds expression in commitments the scope and role of which in the scheme of the Agreement require recourse to a specific legal basis, namely Article 207 TFEU (ex-Article 133) (Case C-268/94, fn 40 above, para 33). While Articles 2 to 4 of the Agreement are concerned in a general way with commercial relations and economic cooperation between the contracting parties, Articles 5 to 15 and 17 to 19 contain provisions on specific matters most of which are, however, linked to economic cooperation (para 42). The ECJ did not state whether it concurred or disagreed with Portugal's argument that Article 207 TFEU is redundant in that agreement (Case C-268/94, fn 40 above, paras 78-79).

⁹¹Although the content and the key concentration of the provisions of association agreements have respectively expanded and shifted over the years, the trade and development have remained at the centre. This is for the simple reason that development is potentially indefinite in scope and could subsume other fields of policy covered in the agreements except when it is constrained by the law (see for example *Opinion 1/94 (WTO)* [1994] ECR I-5273, para 60: "[...] an unduly restrictive legal definition of development policy, failing to take into account of the necessity for a broad approach, could end up hindering the organisation and development of such a policy. On the other hand, a casual acceptance of the breadth of such a policy would allow the Community institutions to avoid the more restrictive rules for adopting external relations measures which have been established for other areas of Community law").

⁹²As mentioned in the previous page, the nature of EU competence for association agreements is not clear-cut. However, the nature of EU competence for development cooperation policy is shared while the nature of EU competence for trade is exclusive).

⁹³See for example Kronenberger, V, 'Ensuring Coherence and Consistency: the role of the ECJ' in Blockmans, fn 31 above, p 206, in particular fn 33; also see Chapter Two of this thesis at 2.3.3., especially fn 164.

⁹⁴This is also known as 'joint competence' following the ECJ's use of this alternative phrase in *Opinion 1/94* (see fn 91 above); and *Opinion 2/91 (Re ILO Convention 170)* [1993] ECR I-1061.

Effectively, mixity blurs the division of competence between the EU and Member States in the context of association agreements.⁹⁵

However, although it circumvents the question of competence, 'mixity' does not mean that the different policy fields especially trade policy and development policy, are entwined beyond distinction. In fact, the Court's reasoning in the *EDF* case⁹⁶ supports this view. The Court did not suggest that mixed competence indicates a mixture of policies beyond distinction, but only that it is an internal question for the EU and its Member States.⁹⁷ It follows that although trade and development are historically entwined in the successive association agreements between EU and SSA, EU trade policy and development policy towards the region as embedded in these agreements are not interwoven beyond distinction or separation. Indeed, recent developments including those that emerged on the back of Lisbon lend credence to this view. This is not simply a question of the retention of policy-specific objectives despite the amalgamation of external policy objectives in Article 21(3) TEU. Rather, there are other indicators. These for example include the removal of trade-related objectives from under the development cooperation provision in the Treaties,⁹⁸ the recent developments in trade policy towards SSA in the context of negotiations of the Economic Partnership Agreements (EPAs),⁹⁹ and the developments in EU development policy *per se* as discussed below.¹⁰⁰ Indeed, it may not be out

95As will be recalled from Case C-316/91 (*EDF* case) discussed above, the question of division of competence where intentionally blurred in practice is an internal question for the EU and its Member States.

96Case C-316/91 (*EDF*) fn 40 above.

97The ECJ reasoned that the question of the division of competence in the context of mixed agreements may actually depend on the interpretation of the agreement and on how in EU law powers are distributed between the Union and its Member States in the relevant fields covered by the agreement. While the issue *prima facie* centers on the division of competence between EU and the Member States, it nevertheless touches on the core competences involved in the case namely trade and development.

98The new Article on trade policy namely Article 206 TFEU no longer features the integration of developing countries as an objective of the EU.

99See Chapter Four of this thesis especially at 4.3.3.

100This include developments in EU development policy in general (see 3.3.2. below), and towards SSA in

of place to argue that there is a conscious effort to disentangle trade and development in EU external relations law and practice.¹⁰¹ Of course, this is paradoxical in light of the inclusion of external trade in the EU's common external action¹⁰² pursuant to Article 21(2) TEU.

With specific regards to coherence, it is already clear that the amalgamation of EU external objectives¹⁰³ under Article 21(2) is geared towards enhancing, if not ensuring coherence. Whether the paradoxical disentangling of trade policy and development policy aids coherence or hampers it is another matter, and one that may not be given to any easy conclusions. The reason for this position is mainly due to the complexity of the interaction between trade and development as discussed elsewhere in this thesis.¹⁰⁴ This is compounded by the fact that development finance as provided for development projects in the developing partner countries of SSA is at all times considered a key development dimension of EU trade policy towards the region.¹⁰⁵ In any event, in so far as policy coherence for development has been intensified *vis-à-vis* its codification at Lisbon, the requirement of coherence of trade policy with development objectives has come to stay whether trade policy and development policy are uncoupled, or coupled as in the successive association agreements on EU external relations with SSA.

particular (see 3.3.3. below).

101In fact, Woolcock explains that the Lisbon Treaty has finalised the separation of the two having dispensed with mixed-agreements in external trade policy (Woolcock, S, 'The potential impact of the Lisbon Treaty on European Union External Trade Policy', Swedish Institute for European Policy Studies (SIEPS), *European Policy Analysis*, 2008, Issue 8, p 1, available at <http://www.kommers.se/upload/Analysarkiv/In%20English/Analyses/Woolcock%20paper%20on%20impact%20of%20Lisbontreaty%20on%20tradepolicy.pdf>, accessed 15 November 2015). Indeed, the Lisbon amendment has removed the previous exclusion of EU development cooperation with the ACP group from the procedural legal basis for development policy as enshrined in Article 209 TFEU (ex-Article 179 EC). There is no further information regarding this anywhere in the Treaties, including the Declarations and Annexes attached to the Treaties. This indicates a possible departure from the practice of association agreements (see the next page below).

102See Leal-Arcas, R, 'The European Union's new common commercial policy after the Treaty of Lisbon' in Trybus, M, and Rubini, L, (ed.) *The Treaty of Lisbon and the Future of European law and Policy* (Cheltenham: Edward Elgar, 2012), p 263.

103Including trade objectives.

104See Chapter Four of this thesis, where it is explained that such complexity is not peculiar to the EU.

105See Chapter Four of this thesis.

At all times, Article 217 TFEU¹⁰⁶ is the legal basis for the successive association agreements signed in the context of EU external relations with SSA.¹⁰⁷ However, this is not the same as saying that Article 217 TFEU is the direct legal basis for EU development cooperation policy in general, and towards SSA in particular. As will be recalled from the above analysis, the EU's competence for association agreement is a non-specific competence framework which a mix of EU policies can be agreed under. Contrastingly, the substantive legal basis for the EU's post-Maastricht development cooperation competence¹⁰⁸ is Article 208 TFEU.¹⁰⁹ In terms of the procedural legal basis for this development policy, there is a difference between internal measures under Article 209 TFEU¹¹⁰ on the one hand, and agreements with third parties under Article 211 TFEU.¹¹¹ EU development cooperation policy towards SSA was traditionally excluded from the procedure for the latter because of its special nature.¹¹² Instead, only the provisions on the procedure for association agreements namely Article 218(2) TFEU¹¹³ and Article 218(6) TFEU¹¹⁴ applied in the context of EU development cooperation with SSA. Nevertheless, from a legal perspective, this does not mean that the provision on the framework of association agreement and those on the procedure for association agreements are the legal basis for EU development policy towards SSA. In contrast, in this specific context, the relevant provisions of the association agreements proves the veritable legal basis for development cooperation strategies with the region. As discussed earlier, although the substance of EU

106Ex-Article 310 EC.

107See for example, Council Decision (2010/648/EU) of 14 May 2010 on the signing, on behalf of the European Union, of the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005 [2010] *OJ* L287/1.

108For the pre-Maastricht situation see 3.2.1. above.

109Ex-Article 177 EC.

110Ex-Article 179 EC.

111Ex-Article 181 EC. The latter is often used in conjunction with Article 218 (2) TFEU (ex-article 300(2) EC) and Article 218(6) TFEU (ex-Article 300(3) EC).

112Pursuant to ex-Article 179(3) – this provision was deleted at Lisbon (see fn 6 above).

113Ex-article 300(2) EC.

114Ex-Article 300(3) EC.

association agreements is in principle dependent on the consensual agreement of the EU and the Member States on the one hand, and a relevant third party on the other hand, the provisions of an association agreement become an integral part of EU law once agreed.¹¹⁵ In this regard, not only are they capable of having direct-effect in the EU legal order as other autonomous internal instruments, they can also serve as a legal basis for EU external action.¹¹⁶ Illustrative of particularly the latter, is the *ECOWAS* case.¹¹⁷ In this case, the ECJ affirmed that the integration of the campaign against the proliferation of small arms and light weapons into Community development cooperation policy was established by the Cotonou Agreement, in particular Article 11(3) thereof.¹¹⁸ References were also made to relevant sections of the relevant Regional Indicative Programme (RIP)¹¹⁹ and also to the relevant Articles of Annex IV of the Cotonou Agreement, on the ‘Implementation and Management Procedures’ for development cooperation in this context.¹²⁰ Overall, the *ECOWAS* case illustrates that the substantial legal basis for EU development cooperation with SSA will be found in the provisions of the Cotonou Agreement. The relationship between these and the legal basis for development cooperation provided in the Treaties¹²¹ is not clear. In the *ECOWAS* case where both the relevant provisions of the Cotonou Agreement and the Treaties were cited, the Court did not attempt a clarification of this particular issue. It can be argued that this is because the main issue in

¹¹⁵See in general Chapter Two of this thesis at 2.3.3.

¹¹⁶*Ibid.*

¹¹⁷Case C-91/05 *Commission v Council (ECOWAS)* [2008] ECR I-3651.

¹¹⁸*Ibid.*, para 38.

¹¹⁹See Chapter Three of this thesis at 3.3.3. below.

¹²⁰*Ibid.*, paras 5-6. This is in line with the position established in Case C-268/94, fn 40 above that the agreements establish the framework of cooperation with broad objectives that are subsequently broken down into specific objectives and projects in the relevant instruments of strategy (see the instruments of EU development cooperation policy towards SSA at 3.4. below, and with specific regards to Mali at 3.5. below).

¹²¹There is the substantive legal basis under Article 208 TFEU (ex-Article 177 EC) and the procedural legal basis under Article 209 TFEU (ex-Article 179 EC). The latter is often used jointly with Article 212 TFEU. Illustrative for example is the DCI (fn 62 above); and Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument contributing to Stability and Peace (hereinafter Instrument for Peace and Stability) [2013] *OJ L77/1*. This succeeds Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability [2006] *OJ L327/1* which expired on 31 December 2013).

ECOWAS was not the question of the correct legal basis for development cooperation policy, but the delineation of the scope of competence between the CFSP and development cooperation policy.¹²² This apparent evasion is not a question of first for the Court seeing as it also did not bring clarity to the question of the accurate legal basis for development policy between Article 209 TFEU¹²³ and Article 211 TFEU¹²⁴ in *Portugal v Council*. It is also noteworthy that the Commission suggested Article 209 TFEU¹²⁵ as the legal basis for development cooperation policy in *Portugal v Council*.¹²⁶ This is as opposed to Article 208 TFEU¹²⁷ which was suggested in the *ECOWAS* case. Arguably, the flexibility and pragmatism employed to navigate the interaction between law and politics in EU external relations law and policies also marks the question of legal basis.¹²⁸ This renders it impossible to say with certainty that coherence, especially as examined in the context of this study,¹²⁹ is contingent on the question of legal basis. As for the practice of association agreement, as mentioned in the previous page, there are indications of a possible departure¹³⁰ from this. This is especially the case in the context of EU external relations with SSA. Indeed, it is noteworthy that the five year renewable Cotonou Agreement expires in 2020, and while the EPA is already supplanting the trade dimension of the agreement, it is not yet clear how the development dimension will be organised. In general, changes regarding the European Development Fund (EDF) which is at the heart of the development aspect of the Cotonou Agreement is anticipated.¹³¹ Of course this will not affect

122Invariably, these are two different policy strands with potentially indefinite scope and objectives (see 3.3.2. below for the scope and objectives of development policy, and Chapter Five of this thesis (at 5.5.2.) for their CFSP counterparts).

123Ex-Article 179 EC.

124Ex-Article 181 EC.

125Ex-Article 179 EC.

126At para 34.

127Ex-Article 177 EC.

128See Chapter Two of this thesis at 2.3.1.

129See Chapter One of this thesis (especially at 1.3.) for the definition of coherence in the context of this study. In other contexts, the flexible navigation of issues might be considered incoherence.

130If not an indication of a clear departure.

131The EDF is outside the EU budget and is rather based on internal agreements between the Representatives of the Governments of the Member States of the European Union, meeting within the Council (This is different from

the objectives of EU development policy as will now be discussed.

3.2.3. The objectives and scope of EU development policy with special reference to SSA

The general objectives of EU external action including with special reference to SSA were discussed in Chapter Two.¹³² The aim of this section is to analyse the specific objectives of EU development cooperation with SSA which also gives an indication of the *scope* of EU development cooperation with the region. This is important for narrowing down the scope of analysis with a view to eventually examining coherence, especially policy coherence for development. Indeed, EU development policy is multidimensional and differentiated and goes beyond the context of EU external relations with SSA.¹³³ This section also attempts to separate the objectives of development policy from their trade objectives counterpart in the context of EU external relations with SSA.¹³⁴

In general, where a legal basis in the Treaties for a field of external action is a substantive

the EU Council figurations mentioned in Chapter Two at 2.5.3.2.). For one such agreement see for example the Internal Agreement for the 11th EDF, fn 62 above. The EDF is tied to the Cotonou Agreement and it has been suggested that it will possibly be integrated in the EU budget after the expiry of the Cotonou Agreement in 2020 (see for example, Gielen, G, 'Development Cooperation and Negotiation in Practice' in Galluccio, M, (ed.), *Handbook of International Negotiation: Interpersonal, Intercultural and Diplomatic perspectives* (Switzerland: Springer, 2015), p 408; and Gavas, M, 'Replenishing the 11th European Development Fund', Overseas Development Institute, Background Note, November 2012 (unnumbered document, first page), available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7904.pdf>, 12 August 2015, where he posits that the EDF will apparently be integrated into the EU budget whether the 11th EDF becomes the last EDF, or the EDF continues beyond the lifetime of the Cotonou Agreement.

¹³²See Chapter Two of this thesis at 2.4.2.

¹³³For the other different dimensions of EU development cooperation policy, see in general, Mold, fn 59 above; and Macleod, fn 2 above, Chapters 18 and 20; and Kaypten, P, J, G, and Van Themaat, V, *Introduction to the Law of the European Communities* (The Hague: Kluwer, 1989), Chapter XI.3; also see Maxwell, *et al*, *European Development Report – A Prospectus* (Mimeo Produced for DG Development, European Commission, 2006).

¹³⁴This separation may not be possible in the context of the nexus between development policy and security policy. In contrast to trade-development nexus, the security-development nexus is also tied to conceptual commonalities which are impossible to disentangle even by law (see Chapters Five and Six of this thesis). For example, it cannot be said that trade is a pre-condition for development or that development is a pre-condition for trade. But this is the sort of intimate nexus between development and security where each is acceptably a necessary pre-condition for the other.

provision, it provides the key starting point for the analysis of the objectives of a policy. However, from the foregoing, it can be argued that the legal basis for EU development cooperation with SSA lies outside the Treaties, and is rather located in the successive agreements between the EU and SSA.¹³⁵ In this regard, the Cotonou Agreement as the contemporary association agreement for EU development cooperation policy with SSA becomes of crucial importance for the discussion of the objectives of EU development policy as it relates to coherence. In fact, the new primary objective of the post-Lisbon development cooperation under Article 208 TFEU namely ‘the reduction, and in the long term, the eradication of poverty’ has been the objective of the Cotonou Agreement right from the latter’s inception many years prior to Lisbon.¹³⁶ Nevertheless, it is important to begin the analysis of the objectives of EU development policy from the provision of EU primary law. Indeed, as mentioned above, the Treaty provision on development cooperation was not entirely left out from the judgement in the *ECOWAS* case regarding the scope of EU development cooperation with SSA.¹³⁷ Moreover, to begin the analysis of the objectives of EU development policy from the provision of the Treaties will help to illustrate the apparent disentangling of trade and development at Lisbon. In this regard, the core provision of EU primary law on EU development cooperation is Article 208 TFEU:

“1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union’s external action. The Union’s development cooperation policy and that of the Member States complement and reinforce each other. Union development cooperation shall have as its primary objective the reduction, and in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that

¹³⁵On the capability of association agreements to influence EU external action see Chapter Two of this thesis at 2.3.3. However see Hoebink’s reference to ‘associationism’ at 3.2. above, especially fn 17.

¹³⁶*Ibid.*; and see Article 1 of the Cotonou Agreement (as amended); also see the Instructions for the Programming of the 11th EDF, fn 62 above, Brussels 15 May 2012, p 2.

¹³⁷See 3.2.1. above.

it implements which are likely to affect developing countries.¹³⁸

The wording of this provision is different from the original Maastricht provision on development cooperation.¹³⁹ For example, the direct reference to ‘the smooth and gradual integration of the developing countries into the world economy’ as an objective of development cooperation is missing from Article 208 TFEU. This aspect which is arguably related in the first instance to trade¹⁴⁰ is now incorporated as an objective of EU external action in general under Article 21(3) TEU. As mentioned earlier, this is an indication that the Lisbon Treaty may have undone the historical entwining of trade policy and development policy and their distinct objectives. It does not bear repeating that the Lisbon Treaty maintained policy-specific objectives despite the amalgamation of the objectives of EU external action under Article 21(3) TEU.

Apart from the apparent separation of trade objectives from development policy objectives, the Lisbon Treaty also introduced a new core objective of development policy into the Treaties namely ‘the reduction, and in the long term, the eradication of poverty’.¹⁴¹ However, as mentioned earlier, this new core objective of development policy is not necessarily new especially in the context of EU relations with SSA. Indeed, it can be argued that this became

138Author's emphasis. The paragraph 2 states that “The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.”

139Ex-Article 177 EC.

140Illustrative is Article 34 of the Cotonou Agreement on the objective of the economic and trade cooperation: ‘Economic and trade cooperation shall aim at fostering the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choices and development priorities, *thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries*. [Author's emphasis]. The last part of this sentence also illustrates that the trade aspect is aimed at the goal of sustainable development and poverty eradication. However, this recognition of the link between trade and development objectives in principle does not always translate into practice or better still is difficult to translate into practice (see for example the institutional distinction between trade and development in practice as discussed in Chapter Four of this thesis).

141The related old wording is ‘to foster ... the campaign against poverty’ (Ex Article 177(1) EC).

the primary objective of EU development policy from the year 2000 when the Cotonou Agreement was adopted.¹⁴² In the *ECOWAS* case,¹⁴³ it was affirmed that the main pre-Lisbon objective of EU development policy under ex-Article 177(1) EC) was the reduction of poverty.¹⁴⁴ This position did not derive its essence directly from the provision of ex-Article 177(1) EC.¹⁴⁵ Rather, the essence of this position came from Article 1 of Cotonou Agreement which emphasises the primary objective of poverty reduction, and in the long term, eradication, consistent with the objectives of sustainable development.¹⁴⁶ Apart from the measurable MDG's which was added to the Cotonou Agreement¹⁴⁷ in the wake of the European Consensus,¹⁴⁸ the objectives of EU development policy is indefinite and all encompassing. It can be argued that this is necessary because any policy to assist developing countries must attempt to address as many of the individual factors hindering development as possible.¹⁴⁹ In the specific case of development cooperation agreements, the objectives are usually generally broad frameworks for subsequent specific strategic objectives and it must be possible for the measures required for their pursuit to concern a variety of specific matters.¹⁵⁰

¹⁴²See 2.3.3. above especially fn 154 on how the provisions of association influences the scope of EU policies.

¹⁴³ Which significantly arose in the context of EU external action towards SSA.

¹⁴⁴Arts, K, and Dickson, A, 'Conclusions: the potential and limits of EU development cooperation policy' in Arts, K, and Dickson, A, (eds.) *EU Development Cooperation: from model to symbol?* (Manchester University Press, 2004) argue that it is difficult to believe that this has not been the goal of the EU development policy all along (p 150).

¹⁴⁵The only reference to poverty in that Article refers to the campaign against poverty in the developing countries (see fn 141 above).

¹⁴⁶The last part of the sentence which refers to 'the gradual integration of ACP countries into the world economy' has been intentionally cut out from here in line with the position of this thesis that trade objectives and development objectives can be separated. Indeed, it has been argued that the contemporary focus on poverty reduction and the MDGs have been the result of the general dissatisfaction in the development policy community with the effects of policies that were implemented in the 1980s and 1990s, aimed market liberalisation amongst others (see Hout, W, 'EU Development Policy and Poverty Reduction: Conclusion and Recommendation' in Hout, W, *EU Development Policy and Poverty Reduction: Enhancing Effectiveness* (Ashgate, 2007), p 196.

¹⁴⁷Article 1 of Cotonou Agreement as amended by the 2010 revision (*OJ L287/3*).

¹⁴⁸European Consensus, fn 27 above, para 2: 'the primary and overarching objective of development cooperation is the eradication of poverty in the context of sustainable development, including pursuit of the [MDGs]'.
¹⁴⁹See Peers, S, 'Fragmentation or evasion in the Community's development policy? The impact of *Portugal v France*', in Dashwood and Hillion, fn 6 above, p 112.

¹⁵⁰Case C-268/94 fn 40 above, para 37.

The Cotonou Agreement illustrates this and goes beyond the economic and social development which marked the successive association agreements that preceded it. As discussed in Chapter Two, in contrast to the previous Agreements, the development cooperation dimension of the Cotonou Agreement outside trade covers political and security aspects including, human rights, democracy, the rule of law and good governance. Furthermore and most pertinently, it covers conflict prevention and other aspects of peace building and structural stability which would fall under civilian crisis management.¹⁵¹ These political and security aspects overlap in law and in practice with the objectives of the CFSP and the CSDP as discussed in Chapters Five and Six of this thesis respectively. In fact, Martenczuk suggests that Article 11 of the Cotonou Agreement potentially renders recourse to the instruments of the CFSP unnecessary or even impossible.¹⁵² However, this is not to say that the indefinite theoretical and practical boundary for development cooperation policy eludes the grasp of law. From a legal perspective, the ECJ has given extensive interpretation to EU development cooperation policy.¹⁵³ Indeed, it has done so especially since Maastricht which used the extensive language of the objectives of EU development cooperation policy to highlight that development cooperation was no longer limited to the original questions of economic and social development.¹⁵⁴ It is since then that the aim of addressing all the causes of poverty and under-development started evolving as the primary objective of EU development cooperation policy. The 'new EU development policy' as laid down in the Agenda for Change is the most recent affirmation of this with its strong focus on poverty reduction through human rights, democracy and key elements of governance, and

¹⁵¹See Article 11 of the Cotonou Agreement for the extensive provision on security.

¹⁵²Martenczuk, fn 39 above, p 468.

¹⁵³See Case C-377/12 *Commission v Council* [2014] Judgment of the Court (Grand Chamber) of 11 June 2014, especially para 37; Case C-91/05 (*ECOWAS*), fn 117 above, especially paras 64-67; Case C-403/05 *Parliament v Commission* [2007] ECR I-0000, para 57; Case C-268/94, fn 40 above, especially paras 13 and 56.

¹⁵⁴See Martenczuk, B, 'Cooperation with Developing and Other Third Countries: Elements of a Community Foreign Policy', in Griller, S, and Weidel, B, (eds.), *External Economic Relations and Foreign Policy in the European Union* (Springer, 2002), p 385-417.

inclusive and sustainable growth for human development.¹⁵⁵ On the one hand, this could be seen as an attempt to address all the causes of poverty and under-development.¹⁵⁶ However, on the other hand, it could be argued that this portrayal of all aspects of development cooperation as being poverty oriented gives the EU greater latitude in being able to justify its projects as being poverty-eradication oriented even when a programme has little direct connection with poverty reduction or has only a tangential impact.¹⁵⁷ As Khaliq explains some of these aspects of development cooperation policy could be pursued as an end in themselves as opposed to where they will help to contribute directly to poverty reduction.¹⁵⁸ He proposes a careful balance ‘in identifying and funding projects to ensure that the ultimate objective of poverty reduction is maintained but that other projects are also funded which create or support an environment in which the poverty reduction projects are as effective as they can be.’¹⁵⁹ However, while the latter may be easy to implement in practice, the former could prove a difficult task. Indeed, Khaliq acknowledges that one of the problems suffered by the EU’s approach to poverty reduction is lack of a succinct definition of poverty.¹⁶⁰ In general, the EU still lacks, even if non-uniquely, the instruments to have a poverty screening on the activities which it finances under its aid programme.¹⁶¹ It is based on this particular problem that Hoebink acclaims that poverty reduction is the Achilles heels of EU development cooperation policy.¹⁶² Arguably, this poses a problem to the determination or assessment of policy coherence for development in the

¹⁵⁵The evolutionary development does not detract from the fact that the primary objective of development policy is the fight against poverty, as enshrined in Article 208 TFEU and Article 1 of the Cotonou Agreement. Indeed the Instructions for the Programming of 11th EDF (see fn 62 above) reiterates that the fight against poverty will remain the primary objective of the development policy of the EU, even though crises and profound changes in the international context in recent years have also forced the EU to sharpen its analysis, streamline its policy agenda and reinforce its operational instruments in support of inclusive and sustainable development (at p 2).

¹⁵⁶See Peers, fn 149 above, p 112.

¹⁵⁷Khaliq, fn 9 above, p 123.

¹⁵⁸*Ibid.*

¹⁵⁹*Ibid.*, p 119.

¹⁶⁰*Ibid.*, p 120.

¹⁶¹Hoebink, P, 'The Coherence of EU Policies: Perspectives from the North and the South' (2005) Commissioned Study, Center for International Development Issues Nijmegen, Brussels, p 4, para 9.

¹⁶²*Ibid.*

context of EU external relations law and policies in general, and towards SSA in particular. In any event, none of these mean that the theoretical and practical scope of EU development cooperation policy is beyond the grasp of legal analysis.¹⁶³

Indeed, if the scope of the objectives of development cooperation is legally indefinite, policy coherence for development will be meaningless or needless. As mentioned above, in tandem with the expansion of the objectives of EU development cooperation policy, the EU has made policy coherence for development a central pillar in its concerted fight against poverty. This is embraced even in the country-specific instrument of development cooperation policy. The Mali case-study illustrates the extent of the appreciation of this in the country-specific instrument of development cooperation policy. Of course, how this plays out in practice is another matter, and may or may not square with the relevant instrument of case study discussed below as the benchmark for the examination of the coherence of other EU policies with development objectives.

3.3. The instruments of EU development cooperation with special reference to SSA

The scope of the objectives of EU development cooperation analysed above, and the amalgamation of the objectives of EU external action in general under the post-Lisbon Article 21 TEU *prima facie* render it difficult to delimit the instruments of EU development cooperation policy. Indeed, not only would it be nearly impossible to embrace all the instruments of EU development policy towards the region, it is also undesirable within the limited confines of this

¹⁶³As the ECJ affirmed in *Opinion 1/94*: “[...] an unduly restrictive legal definition of development policy, failing to take into account of the necessity for a broad approach, could end up hindering the organisation and development of such a policy. On the other hand, a casual acceptance of the breadth of such a policy would allow the Community institutions to avoid the more restrictive rules for adopting external relations measures which have been established for other areas of Community law” (see *Opinion 1/94* fn 91 above, para 60).

thesis. However, it is possible to identify two core instruments that are most relevant for the investigation of coherence in the context of this thesis. These are the successive association agreements which are briefly discussed as the key primary instruments of direct pertinence to the decision-making and implementation of EU development cooperation with SSA on the one hand, and the instruments that bear the EU's specific approach to a country on the other hand.¹⁶⁴ The latter which is also of both institutional and objective pertinence provides an introductory baseline for the subsequent analysis of the instrument bearing the EU's specific approach to Mali.¹⁶⁵ In particular, the country-specific approach is the instrumental framework on which the coherence of other policies with the objectives of development policy can be assessed in the context of a case study in light of the differentiated approach to EU development policy.¹⁶⁶

3.3.3.1. The successive association agreements (prevalently the Cotonou Agreement)

From the foregoing, it is clear that the primary framework for EU development cooperation policy with SSA is provided in the successive association agreements. The current instrument in this regard is the Cotonou Agreement, in particular Part 3, Title I and Part 4, and the relevant Annexes.¹⁶⁷ In providing the objectives of development cooperation policy as discussed above, the instrument provides for the former to be pursued in an integrated approach incorporating economic, social, cultural, environmental and institutional elements.¹⁶⁸ This integrated approach is aimed at providing a coherent enabling framework of support to country

¹⁶⁴Although there are regional approaches, the regional approaches are designed along the lines of the geographical subregions of SSA which analysis is outside the scope of this analysis (see Chapter One of this thesis at 1.0. above, especially fn 19).

¹⁶⁵See 3.5.1. below.

¹⁶⁶See 3.3.3.1. below.

¹⁶⁷The Annexes and protocols are parts and parcel of the agreement and have the same legal status as the rest of the agreement (see Article 100 of the Cotonou Agreement on the status of the texts).

¹⁶⁸Article 20(1) Cotonou Agreement.

development strategies.¹⁶⁹ Since this is primarily a framework instrument especially in relation to development policy,¹⁷⁰ the development strategies are fleshed out in a Compendium on Development Cooperation Strategies¹⁷¹ attached to the Agreement. However, in practice, the areas covered in the compendium, as in the Cotonou Agreement, are not indiscriminately applicable to developing countries of the ACP in general, or indeed, to the countries of SSA in particular. As reaffirmed in the Agenda for Change, the EU runs a differentiated approach to development cooperation and aid allocation.¹⁷² This means giving priority to regions most in need, and within those regions, to countries most in need especially taking into account fragility and the security-development nexus.¹⁷³ For example, while SSA attracts a special mention in the relevant EU instruments due to the level of poverty and the security-development nexus in the region,¹⁷⁴ there is a further differentiation in the EU's approach to the countries of the region based on the same differentiation parameters.¹⁷⁵ This is the main reason why the Least Developed Countries (LDCs) such as Mali attract special treatment as discussed below.¹⁷⁶ In general, differentiation is considered the key to achieving maximum impact and value for

¹⁶⁹Ibid.

¹⁷⁰This is in contrast to the trade provisions which would not normally require any further measures beyond the obligations in the association agreements. However, see the Cotonou Agreement regarding the Economic Partnership Agreements (EPAs).

¹⁷¹See Article 20(2) of the Cotonou Agreement; and also European Commission (Directorate General – Development), the Compendium on co-operation strategies, partnership agreement between the Members of the group of African, Caribbean and Pacific states and the European Community and its Member States [signed at Cotonou, June 2000], Brussels, 2001.

¹⁷²Agenda for Change, fn 62 above, para 4; and also Council Regulation (EU) 2015/322 of 2 March 2015 on the implementation of the 11th European Development Fund [2015] *OJ* L58/1 (hereinafter Regulation on the Implementation of the 11th EDF), Article 3; DCI, fn 62 above, Preamble para 14. As mentioned earlier (at 3.1. above), EU development cooperation policy is mainly about aiding poverty eradication and sustainable development.

¹⁷³Ibid.

¹⁷⁴See the European Council, Council conclusions ‘Increasing the Impact of EU Development Policy: an Agenda for Change’ 3166th Foreign Affairs Council meeting Brussels, 14 May 2012, especially paras 1 and 15; and Agenda for Change, fn 62 above, para 4.

¹⁷⁵ Ibid.; also see Part 5 of the Cotonou Agreement, especially Chapters 1 to 3 thereto; and also the Strategy for Security and Development in the Sahel, EEAS, 2011, available at http://eeas.europa.eu/africa/docs/sahel_strategy_en.pdf, accessed 12 January, 2013

¹⁷⁶See 3.5. below. While there is also a special differentiation in favour of Least Developed Landlocked Countries (LDLCs), this pertains mainly to trade relations and is therefore discussed as it relates to Mali in Chapter Four of this thesis.

money. Indeed, achieving maximum impact and value for money is very important to the EU. This is one of the reasons for the quest for coherence as discussed in Chapter One. Nonetheless, it is arguable that differentiation is a critical response to the criticism that the EU implements its development policy on a ‘one approach fits all’ perspective¹⁷⁷ with a significant reductive effect on the impact of the policy on poverty reduction.¹⁷⁸ In any event, EU development cooperation strategies are built around national development plans¹⁷⁹ or similar comprehensive development documents, adopted with the involvement of national and regional bodies concerned.¹⁸⁰

It is noteworthy that in so far as EU development cooperation policy is mainly about financially aiding development strategies, differentiation in this context does not relate only to the strategic objectives but also to aid allocation.¹⁸¹ While there is a general financing instrument for development cooperation,¹⁸² and also other thematic financial aid instruments for EU external action in general,¹⁸³ the key financial instrument for development cooperation under the successive association agreements signed in the context of EU external action towards SSA is the EDF.¹⁸⁴ This special financial mechanism based on the special historical evolution of EU external relations with SSA¹⁸⁵ is the financing instrument for the Cotonou Agreement and its

177See Khaliq, fn 9 above, p 121 – 122, including fns 182 and 183 on p 122. However, it will be remembered that the principle of alignment is an aspect of the Cotonou Agreement.

178Ibid., p 120.

179See Article 19 of the Cotonou Agreement; and also 3.4. below.

180See for example Martenczuk, fn 20 above, p 202; also see the discussion on the National Indicative Programmes (NIPs) at 3.4. below.

181See for example, Agenda for Change, fn 62 above, para 4.

182See DCI fn 62 above. The DCI funds the Joint Africa-EU Strategy (JAES), adopted at the EU-Africa Summit on 8-9 December 2007 (JAES), see DCI Preamble, para 9. The JAES is discussed in Chapter Seven of this thesis.

183For a list of those instruments for financing external action for the period from 2014 to 2020, see Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, Preamble, para 1.

184See for example, Internal Agreement for the 11th EDF, fn 61 above, especially Preamble, para 4. Developing countries that are parties to the Cotonou Agreement or funded by the EDF are expressly excluded from the DCI by virtue of Article 1(1)(a)(i)-(ii) of the DCI.

185See 2.2.4 above.

development strategies.¹⁸⁶ Although the EDF is rightly an instrument of EU development cooperation policy towards SSA,¹⁸⁷ it is only a financing instrument. Hence, apart from its special procedure,¹⁸⁸ it is similar to other financial instruments of EU external action which will not really be considered the same as the substantive instruments of EU external action. In this regard, although there have been clamours for the EDF to be brought under the EU budget¹⁸⁹ and in line with the general procedures that regulate the instruments for financing EU external action in general, it can be argued that the potential contribution of the latter to coherence is not significant. This is for the main reason that the special status of the EDF operates on the peripheral of the norms, instruments and institutional procedures which are at the heart of the coherence discourse especially as selectively determined in the context of this thesis.¹⁹⁰ In general, the issue surrounding the distinct procedure for the EDF borders on transparency,¹⁹¹ and although this may be desirable, it is outside the scope of this thesis.¹⁹²

By and large, for whatever may be its other implications, the special status of the EDF does not constitute a point of divergence between say EU trade policy and EU development policy with

¹⁸⁶See fn 171 above.

¹⁸⁷See in general, Tannous, I, 'The Programming of EU's External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO' (2013) 18 *EFARev* 3, p 329.

¹⁸⁸See fn 171 above.

¹⁸⁹See for example the Final Report of the Working Group on External Action, CONV 459/02, para 56; and Martenczuk, fn 20 above, p 201.

¹⁹⁰See Chapter One of this thesis.

¹⁹¹Since it is outside the EU budget which is co-managed by the Council and the European Parliament, the latter has a more limited role in the functioning of the EDF than in the development cooperation instruments financed by the EU budget. As regards the proposal for the Financial Regulation applicable to the 11th EDF, the European Court of Auditors welcomed a number of improvements, but maintained a general observation on transparency, considering that the complexity of the document entails a significant risk of legal uncertainty and errors (see European Parliament, European Development Fund, Joint development cooperation and the EU Budget: Out or In?, European Parliamentary Service, In-Depth Analysis, November 2014, p 1). Indeed, each EDF comes with its own procedure laid down for determining the allocation of funds and Member States' contributions to those funds (see for example, Internal Agreement for the 11th EDF, fn 61 above, Preamble, para 4; and Regulation on the Implementation of the 11th EDF, fn 172 above, Preamble para 10; and also in general, Instructions for the Programming of the 11th EDF, fn 62 above).

¹⁹²The coherence of the different financial instruments of EU development policy is not the focus of this thesis.

SSA in practice.¹⁹³ In contrast, the EDF is at the heart of EU development cooperation policy as it comprises trade and development in this context. Otherwise, where the difference in financing between development cooperation policy and the CFSP may be an issue for coherence, this is an issue which will equally arise between the CFSP and other development finance instruments that come under the general EU budget. Indeed, it has been suggested that a recent reform has made it possible for the EDF to use the same financial and administrative procedures as the DCI which is the central EU financial aid instrument.¹⁹⁴ Overall, the EDF is not given to any special analysis in the context of this thesis, and will only be discussed as an integral aspect of the relevant substantive instruments of development policy and their institutional dimension as discussed below.

3.3.3.2. EU Development Cooperation Indicative Programmes and Strategy Papers

As mentioned above, beyond the framework association or partnership agreements, it is the region-specific and country-specific instruments of development cooperation policy which are most relevant to the investigation of coherence, especially policy coherence for development in the context of the focus of this thesis. These instruments are the Country Strategic Papers (CSPs) and the National Indicative Programme (NIPs) on the one hand, and Regional Strategic Papers and Regional Indicative Programme on the other hand.¹⁹⁵ The legal provisions relating to these are found in Annex IV of the Cotonou Agreement entitled ‘Implementation and Management Procedures’. Although the two groups of programming instruments are important

¹⁹³Whether this will eventually be an issue in the light of the EPAs and the new EPA Development Programme (PAPED) discussed in Chapter Four of this thesis is something that lies in the future.

¹⁹⁴“EC – Development Assistance Committee Peer Review”, (DAC 2007), p 38, available at www.oecd.org/dataoecd/57/6/38965119.pdf accessed 28 February 2009. For the DCI, see fn 67 above.

¹⁹⁵The NIPs and RIPs are the equivalent of Multi-annual Indicative Programmes (MIP) under the non-EDF programmes such as those funded under the DCI (see Instructions for the Programming of the 11th EDF fn 61 above, p 15 especially fn 9).

for addressing the question of coherence for the reasons discussed above, the latter two namely the RIP and the NIP are the most relevant to the coherence discourse.¹⁹⁶ This is not simply because of its institutional implication for the question of coherence.¹⁹⁷ Indeed, the two different groups hold the same institutional implications for the EU.¹⁹⁸ However, the RIP and the NIP are expressly designated as the central document of the programming process for EU development cooperation with the different partner countries.¹⁹⁹ In this regard, they are management tools to identify and define actions for attaining the objectives of EU development cooperation policy with a specific region or country respectively. As mentioned earlier, in practice, the development cooperation strategies which are usually set out in the RIPs and NIPs are built around regional and national development plans or similar comprehensive development documents, adopted with the involvement of the respective regional and national bodies concerned. However, this has most recently become a mutually reinforcing process where the priorities of the national development plans are also required to be consistent with the priorities of EU development cooperation policy.²⁰⁰ For example, in the context of the 'new EU development policy', the national development plans are required to be consistent with the proposed priorities outlined in the Agenda for Change Communication, including the EU's fundamental values.²⁰¹ These include, human rights, democracy and good governance, as well as other values such as gender equality and respect for the rule of law. In this regard, it can be argued that the consistency required in the context of the 'new EU development policy' may not

196Hoebink, P, 'The Coherence of EU Policies: Perspectives from the North and the South' (2005) Commissioned Study, Center for International Development Issues Nijmegen, Brussels, p 9.

197 See Article 9(3)(i)-(iii) of the EEAS Decision (fn 24 above) as also discussed at 3.4. below.

198Ibid.

199See the Instructions for the Programming of the 11th EDF, fn 61 above.

²⁰⁰Ibid., para 4. For the debate surrounding this see for example, Koch, S, 'From Poverty Reduction to Mutual Interests? The Debate on Differentiation in EU Development Policy' [2015] 33 Development Policy Review 4, p 479-502.

²⁰¹Ibid.

be so new after all, seeing as it is similar to the subsisting 'political conditionality'²⁰² applied in EU development cooperation policy. Illustrative is the political conditionality under Article 96 of the Cotonou Agreement in the context of EU development cooperation policy with the ACP group of states including the countries of SSA. However, there is a slight difference between the subsisting and the new. The former is a negative or *ex-post* conditionality which entails the use of pressure and enforcement - including a reduction or suspension of benefits – to obtain desired reforms or political changes from recipient governments in an ongoing donor-recipient relationship.²⁰³ In contrast, the latter is a positive or *ex-ante* conditionality which entails the imposition and fulfilment of laid out conditions prior to a donor-recipient agreement or partnership.²⁰⁴ Alternatively, it can also be argued that the two different dimensions are embraced in EU development cooperation policy in so far as the *ex-ante* conditionality is only a commitment on both the side of the donor and the recipient to the promotion of human rights. Indeed, this aligns with the two characteristics of EU human rights policy as established in the Resolution on Human Rights and Development.²⁰⁵ This includes active promotion of human rights and democratic principles through dialogue and financial assistance within the context of indicative programmes on the one hand, and the promotion of human rights through negative conditionality and restrictive sanctions in the case of violation of essential elements on the other

202This requires meeting some prescribed political conditions as set by donor. For a detailed discussion see in general, Molenaers, N, *et al* 'Political conditionality and foreign aid' (2015) 75 *World Development*, p 2–12; and with specific regards to the EU, see Portela, C, *European Union sanctions and foreign policy: When and why do they work?* (London: Routledge, 2010); and Fierro, E, *The EU's approach to human rights conditionality in practices* (The Hague: Kluwer Law International, 2003).

203Also known as sanction, this is the more widely known type of political conditionality (see for example Stokke, O, *Aid and political conditionality* (London: Routledge, 1995), p 12 where political conditionality is defined as; 'the use of pressure, by the donor government, in terms of threatening to terminate aid, or actually terminating or reducing it, if conditions are not met by the recipient'; also see Fierro, fn 202 above, p 131; and Schimmelfennig, F, and Sedelmeier, U, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe' (2004) 11 *JEPP* 4, p 661–679, at p 670–671). In trade policy, sanctions refer to the withdrawal of trade benefits in order to force countries to comply with their international obligations to respect human rights (Zhou, W, and Cuyvers, L, 'Linking international trade and labour standards: The effectiveness of sanctions under the European Union's GSP' (2011) 45 *Journal of World Trade* 1, p 63–85).

204Schimmelfennig and Sedelmeier, fn 192 above, p 4.

205See Chapter Two of this thesis at 2.4.2. in particular fn 191.

hand. Indeed, the two can be said to interact in so far as the indicative programmes namely the RIPs and the NIPs are 'indicative' only and not entitlements.²⁰⁶ Their funding allocations are subject to revision in the light of developments not only in need, but also in performance. The implication is that benefits can be withdrawn in the event of breach of the relevant principles.²⁰⁷

With regards to the RSP and CSP, although these are anticipated by the Cotonou Agreement,²⁰⁸ they will only be needed in two situations in practice. For example, they will be needed where no agreement with the partner country or region can be reached to base the EU programming on the national or regional development plan respectively.²⁰⁹ Apart from this, they will also be needed where the national development plan does not provide a sufficient basis for programming by the EU, or if Joint Programming is not possible.²¹⁰ It is not clear whether these situations occur often. But it is clear that these would be expected in regions or countries with limited capacity and/or political will.²¹¹ Where, the CSP is adopted, it is subsequently 'translated' into a NIP, which lays out in budgetary terms programmes and projects to be undertaken.²¹² In any event, although it has been suggested that Mali's mentality of dependence on aid has limited the Country's ability to come up with nationally-owned development priorities,²¹³ the following case study on Mali illustrates that the EU-Mali NIP for the 11th

206European Community (EC), EC profile, p 5 (source unknown).

207Ibid.

208See Article 8.3 of Annex IV of the Cotonou Agreement; also see further information on the CSPs/RSPs available at <http://www.acp-programming.eu/wcm/en/programming-references/country-and-regional-programming/country-and-regional-strategy-paper-csprsp/what-is-a-csprsp.html>, accessed 21 September 2012.

209In accordance with the Cotonou Agreement, Annex IV, Articles 2 and 8.

210See Instructions for the Programming of the 11th EDF fn 61 above..

211See DAC 2007, fn 194 above, p 70 where the situation is categorised into two cases namely when alignment may not be desirable (e.g. Myanmar, Zimbabwe), and when alignment is desirable but difficult ("shadow alignment", e.g. DRC).

212European Community (EC), EC Profile, fn 206 above, p 9.

213Bergamaschi, I, 'Mali: Patterns and Limits of Donor-driven Ownership', Oxford University Global Economic Governance Programme, Global Economic Governance *Working Paper* 2008/41, p 9, available at http://www.globaleconomicgovernance.org/sites/geg/files/GEG%20WP%202008_41%20Mali%20-%20Patterns%20and%20limits%20of%20donor%20driven%20ownership%20-%20Isaline%20Bergamaschi.pdf

EDF²¹⁴ was in fact adopted jointly. Overall, the indicative programmes and strategy papers do not only provide ‘strategic frameworks’ for EU assistance programmes, they are also designed to contribute to the overall coherence of external assistance policy with other EU policies amongst others. In this regard, they are comprehensive in approach, assessing the overall situation of a partner country with a view to an all-EU approach bordering on the construction of a united whole. Illustrative is the Mali NIP as discussed after the institutional dimension of EU development policy.²¹⁵ Whether the coherence aimed at in the instruments is achieved in practice is another matter, and something that would greatly depend on what is legally permissible within the EU legal framework for external relations, as well as on the concerned actors including the Member States and the relevant EU institutions.

3.4. The Institutional dimension of EU development cooperation policy towards SSA²¹⁶

This section analyses the roles of EU institutions in the decision-making, implementation and enforcement of EU development cooperation policy towards SSA. This is with a view to subsequently determining coherence between this and other relevant policies investigated in this thesis, including with special regards to policy coherence for development. In doing this, the post-Lisbon changes are particularly highlighted especially the roles of the HR/VP and the EEAS where they arise.

²¹⁴See *Union Européenne – Mali Programme Indicatif National 2014-2020*.

²¹⁵See *Union Européenne – Mali Programme Indicatif National 2014-2020* (discussed at 3.4. below). However, the development cooperation instrument preceeding this was a CSP and a NIP combines together as was previously required (see *Mali-Communauté européenne, Document de stratégies pays et programme indicatif national pour la période 2008-2013*, available at http://ec.europa.eu/europeaid/sites/devco/files/csp-nip-mali-2008-2013_fr.pdf, accessed 25 October 2015).

²¹⁶A general overview of the EU institutional framework for coherence was provided in Chapter Two of this thesis (at 2.5.).

3.4.1. Institutions and policy making in the context of EU development cooperation with SSA: an overview

The difficulty in separating EU development policy and EU trade policy was acknowledged at the beginning of this Chapter. This is due to the entwining of the two with the instrument of association agreements. The institutional procedure for policy-making in the context of association agreements is one of the situations where a separation between development policy and trade policy is onerous. However, some distinctions can be made. For example, from observation, it can be argued that the institutional procedure for association agreement applies more to trade than to development policy especially in the context of EU external relations with SSA. This is due to the fact that while the two are entwined under association agreements, the policy making for trade ends at this stage.²¹⁷ This is not same for development policy for which only a broad framework is provided as discussed above. Furthermore, as discussed in Chapter Four, it is arguable that trade institutions are also more prominent at this stage of trade and development policy making. Therefore, a discussion of the institutional procedure at this stage of policy making in the context of association agreement is better carried out in Chapter Four where trade is discussed. This will better enable an assessment of the coherence of trade policy with development policy based on the analysis of the dimension brought by EU trade institutions in that procedure.²¹⁸ Moreover, the stage where the discussion of the post-Lisbon EEAS becomes relevant is not at this stage of policy-making but at the implementing stage as will now be discussed.

²¹⁷This would normally be the case unless new agreements are anticipated as is the case with the Economic Partnership Agreements provided for under the framework of the Cotonou Agreement (see Chapter Four of this thesis).

²¹⁸In this regard, the decision-making procedure for the EDF is also considered irrelevant. In general, as indicated above (at fn 191 above) the complexity of the EDF and its document entails a significant risk of legal uncertainty and errors.

3.4.2. Institutions and Implementation of EU development cooperation with SSA

As is clear from the above analysis, the implementation and management of EU development cooperation policy with SSA is provided for in Annex IV to the Cotonou Agreement appropriately titled 'Implementation and Management Procedures'. Koning aptly explains that the delivery of the aid programme throughout the project cycle is jointly the responsibility of the ACP States and the EU.²¹⁹ As mentioned earlier, development cooperation policy is about financially aiding development through development strategies and the attendant programmes. Under this arrangement, the EU is responsible for preparing and adopting financing decisions on projects and programmes. In contrast, the contracts concluded for works and services remain national contracts which the recipient States alone are responsible for negotiating and concluding.²²⁰ The size of the aid component, which basically aims at improving the living conditions in the recipient States is determined by intergovernmental negotiations between the EU Member States. This takes place within the EDF Committee and is an aspect of the involvement of the Member States in the mixity dynamics, as is their involvement in the negotiation of the association agreements.²²¹ Beyond this stage comes programming, and this is the implementing stage where the tasks incumbent on the EU are performed by the Commission and the EEAS who have to disburse aid on the basis of the NIP.²²² As will be

²¹⁹See Koning, A, 'Strengths and Weaknesses in the Management of the European Development Fund: 1995, ECDPM, *Working paper*, No. 8, p 19.

²²⁰This division of powers between the EU and its partners in this context has been confirmed in case law (see for example Case 33/82 *Murri Freres v Commission* [1985] ECR 2759.

²²¹See Chapter Four of this thesis at 4.4.

²²²Or a RIP as the case may be. In contrast, the responsibility incumbent on the Governments of the EU's development partners (in this case the countries of SSA) is performed by the National Authorisation Officers (NAO). The NAO is essentially responsible for the identification and preparation of projects and programmes, while the appraisal of projects or programmes is a joint responsibility. In this regard, although the Governments of the countries of SSA would usually be involved in some stages of the programming, their roles are irrelevant to answering the research question and are not part of the focus of the investigation. In the same vein, from this point, references will be made only to the NIP since the same process applies to it and the RIP, and it is still the NIP that the thesis concentrates on in the end due to the country case study.

recalled from above,²²³ the EEAS should seek to ensure that EU external programmes fulfil the objectives for external action as set out in Article 21 TEU, in particular in paragraph (2)(d) thereof, and that they respect the objectives of the Union's development policy in line with Article 208 TFEU, in the light of policy coherence for development. However, it is noteworthy that how the EEAS will achieve these depends on the extent of the opportunity accorded to it in practice within the EU's traditional institutional constellation where it has just stepped in. As this study illustrates, any reductive impact of its influence has more to do with its exclusion from key policies that is relevant to policy coherence for development,²²⁴ than the fact of its complex interaction with the Commission in the context of development programming. Indeed, going by recent developments in its position in the development programming process, it is arguable that the EEAS is becoming more influential in development programming, if it has not become more influential than the traditional institutions previously occupying this forte.²²⁵

To paint a clear picture of the different roles of the Commission and the EEAS with a view to a subsequent assessment of coherence of other external policies with development policy, it is generally preferable to follow the two key stages of the development project cycle namely Programming and Management.

²²³See 3.1. above.

²²⁴See for example Trade discussed in Chapter Four of this thesis. By virtue of Article 3(2) of the EEAS Decision, the EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions, *except on matters covered by the CSDP* [author's emphasis].

²²⁵See 3.4.2.1. below.

3.4.2.1. Programming: between the HR/VP, the EEAS, the Commission and EU Delegations

Programming includes the preparation of the NIPs²²⁶ setting out the budget.²²⁷ As mentioned earlier, this thesis is not concerned with the coherence of financial instruments. In contrast, the study of the coherence of instruments in this thesis has to do with the substantive legal and political instruments of the relevant EU policies examined in this thesis. However, it is noteworthy that the references to financial programming are not different from the programming of the development strategies as it centres on the NIPs and their development objectives.

Although the roles of the institutions as provided in the relevant legal instruments are not followed to the letter in practice,²²⁸ it is still necessary to analyse them in light of the primarily legal focus of this thesis. For example, in contrast to the pre-Lisbon dispensation in which both the programming and the management cycles fell under the responsibility of the Commission, the primary post-Lisbon provision on the role of the Commission in this context allocates only the management of programmes solely to the Commission.²²⁹ The programming process, as opposed to the management of programmes, falls under the shared responsibility of the

²²⁶Or the CSP and RSP where absolutely necessary (see the analysis on the previous page).

²²⁷The Internal Agreement for an EDF sets the aggregate amount of Union aid to available under each EDF. It also defines the various financial envelopes of the EDF, the contribution key and the contributions to the EDF. The EDF procedures appear straightforward: 1) notification of the ACP State of the amount of available resources. 2) drafting an Internal Commission Policy paper. 3) preparing a draft NIP by the ACP State. 4) dialogue between ACP and EU on the draft NIP. 5) drawing up pre-programming document to inform the EU Member States. 6) discussion with the Member States in the EDF Committee. 6) drawing up of the NIP and preparation for signature (Nohlke, A, *Aid Coordination Profiles* (Konstanz: Constance University, 1992), p 22).

²²⁸With specific regards to the EEAS see Erkelens, L, and Blockmans, S, *Setting up the European external Action Service: An institutional act of balance*, *CLEER Working Papers* 2012/1, p 9 and p 31; and the *Working Arrangements between Commission Services and the European External Action Service (EEAS) in relation to external relations issues*, SEC(2012) 48, 10 Jan. 2012 ('Working Arrangements'). Signed on 13 January 2012 by the Secretary General of the Commission and the Chief Operating Officer of the EEAS, (unpublished SEC-document).

²²⁹Article 17(1) TEU.

Commission and the EEAS pursuant to Article 9 of the Council Decision on the EEAS.²³⁰ However, some complexity arises as a result of the specific wording of the relevant provisions. For example, Article 9(3) EEAS Decision provides that the EEAS shall contribute to the programming and management cycle for the development strategies under *inter alia*, the EDF, and shall have responsibility for preparing the decisions of the Commission regarding the steps for developing the NIPs within the programming cycle. Furthermore, under the same Article, the HR/VP and the EEAS shall work with the relevant members and services of the Commission throughout the whole cycle of programming, planning and implementation, and all proposals for decisions will be prepared by following the Commission's procedures and will be submitted to the Commission for adoption. Moreover, in a more complex twist, Article 9(4) provides that the proposals relating to programming for the EDF shall be 'prepared jointly' by the EEAS and the Commission 'under the responsibility' of the Commissioner responsible for Development Policy and shall be 'submitted jointly' with the HR/VP for adoption by the Commission.²³¹ This does not in any way clarify what roles the EEAS and the Commission Services should take in the preparation of financial allocations and the NIPs within the framework of for example, the EDF. Koutrakos argues that the final outcome seeks to square the circle because even though the HR/VP is in principle responsible for the coordination of EU financial instruments,²³² the management of the instruments falls within the responsibility of the Commission.²³³ The difference between coordination and management is not clear-cut.

In any event, going beyond the complex legal provisions, the new programming framework provided in the Instruction for the Programming of the 11th EDF²³⁴ illustrates the existence of a

²³⁰See EEAS Decision, fn 24 above, especially Article 9.

²³¹*Ibid.*, Article 9(4).

²³²*Ibid.*, Article 9(2).

²³³Koutrakos, P, 'Habemus European External Action Service' (2010) *ELR Editorial*, p 608.

²³⁴Instructions for the Programming of the 11th EDF, fn 62 above.

workable practical dimension to the interaction between the EEAS, the Commission and the EU Delegation in this context. This is based on a Working Arrangement signed between the Commission and the EEAS.²³⁵ In this regard, programming starts with EU Delegations in the relevant partner countries and regions submitting to relevant geographical Directors in the EEAS and The Commission's Directorate-General for International Cooperation and Development (DG DEVCO)²³⁶ an analysis of the existing national or regional development plan as well as a proposal for the overall lines of the EU response, or where possible, a draft joint programming document.²³⁷ The EEAS and DEVCO will examine the assessment or the NIP/RIP and the proposal for the overall lines of the EU response submitted by the EU Delegation so as to ensure that the proposals are in line with relevant EU approaches, policies and priorities as required by the Agenda for Change.²³⁸ The EEAS will coordinate this process jointly with relevant DEVCO services and ensuring the involvement of all relevant Commission services and the EIB.²³⁹ The EEAS, in agreement with DEVCO, will then transmit instructions to the EU Delegation. Subsequently, and acting on the basis of the instructions provided by the EEAS in agreement with DEVCO, the EU Delegation will transmit a draft RIP or NIP to the EEAS and DEVCO who will again go through the same process as with the initial RIP or NIP. However, at this stage what the EEAS, in agreement with DEVCO, will transmit back to the EU delegation are the final instructions for the draft NIP. Once the final draft is received from

235See Working Arrangement, fn 228 above.

236Hereinafter DEVCO. DEVCO is responsible for designing European international cooperation and development policy and delivering aid throughout the world (see 'About International Cooperation and Development - DG DEVCO', available at https://ec.europa.eu/europeaid/general_en, accessed 10 February 2016).

237As discussed in Chapter Two of this thesis at 2.5.3.6., the EU Delegations supports the EEAs on the ground. As the EU Delegation to Mali explains on their website, they play an important role in the analysis of the local situation (see *Délégation de l'Union européenne en République du Mali*, available at http://eeas.europa.eu/delegations/mali/about_us/delegation_role/index_fr.htm, accessed 10 January 2015). When the EU Delegation, on the basis of its assessment, considers that the existing national or regional development plan cannot be the basis for the EU programming, it will submit to EEAS and DEVCO geographical Directors its assessment as well as a duly justified proposal to instead prepare a CSP/RSP.

238See the above analysis.

239This is within the context of Country/Regional Team Meetings (CTMs/RTMs) that the EEAS will organise.

the EU Delegation, the subsequent internal Commission process for the finalisation of the programming documents will then be taken forward as far as possible. The formal decision-making process, involving all relevant Commission services, will take place upon the adoption of the necessary legal instruments, being the legal basis for the programming documents.²⁴⁰ Effectively, the programming documents, including the indicative allocations therein, shall be approved by the Commission.²⁴¹ This is the essence of the joint responsibility between the Commission and the EEAS provided for in the EEAS decisions. Of course this does not mean that there may not be internal wrangling, especially seeing as the newly established EEAS is clearly now formally responsible for this first stage of strategic programming. However, this is not relevant in so far as any wrangling does not relate to incoherence in practice between EU external policies towards SSA especially as examined in this thesis. In contrast, it is noteworthy that the mandate of the Head of Delegation includes ensuring the application of the requirement of policy coherence for development in the programming process as a responsibility of that office.²⁴² In this regard, programming can play a supplementary role in informing EU policy debates.²⁴³ It could look into how EU policy areas as diverse and potentially contradictory as trade and finance, climate change, food security, migration, security and development need to be shaped so that they do not undermine and where possible contribute to realising development objectives.²⁴⁴ Indeed, as discussed above, the programming instrument namely the NIP is an instrument for coherence. Of course, it has to be admitted that it may not always be possible to foresee some situations such as the eruption of violent conflict. For even in situations of

²⁴⁰See programming steps 5 and 6 in fn 227 above.

²⁴¹ In accordance with the procedure set out in Article 14 of the Regulation on the Implementation of the 11th EDF (fn 160 above) pursuant to Article 7 of the same Regulation. Subsequently, the programming documents shall be endorsed by the ACP State or region concerned as stipulated in Annex IV to the ACP-EU Partnership Agreement.

²⁴²'Reprogramming EU development cooperation for 2014-2020', ECDPM *Discussion Paper*, No 129, April 2012, p 9.

²⁴³*Ibid.*

²⁴⁴*Ibid.*

fragility, the eruption of violent conflicts will not always be expected. Overall, the programming process offer a window of opportunity to the EEAS to fulfil its mandate as the body established to ensure a more coherent external action. Nonetheless, the working arrangement between the Commission and the EEAS once more demonstrates the possibility and the potential of effective institutional dialogue. Undoubtedly effective institutional dialogue will aid coordination and improve coherence, albeit not necessarily the overall coherence in output. As trade and CDSP illustrate, some policies are still shrouded in specificity in a way that is well removed from the other external policies especially in practice, but also in law.²⁴⁵

3.4.2.2. Management: entirely the Commission's forte (including within the EU Delegation)

The next stage is the management stage which covers the technical contractual and final implementation of the programme set out in the NIP, monitoring and evaluation. The best illustration of this stage can be achieved with the relevant provisions of the Regulation on the Implementation of the 11th EDF.²⁴⁶ In this regard, the Commission shall assume the responsibilities of the Union as defined in Article 57 of the Cotonou Agreement.²⁴⁷ By and large, the Commission's implementation of programmes of development strategies agreed under the NIPs begins and ends with the disbursing of funds to recipient governments and /or Non-Governmental Organisations (NGOs) including for onward disbursement to members of the civil society. Arguably, the Commission will be doing this through the Commission's section of

²⁴⁵See Chapter Four and Chapter Six.

²⁴⁶See Regulation on the Implementation of the 11th EDF, fn 172 above.

²⁴⁷To that end, it shall implement the revenue and expenditure of the 11th EDF in accordance with the relevant provisions of the Implementing Regulation, under its own responsibility and within the limits of the 11th EDF resources (Ibid, Article 16(1)). Furthermore, the commitment of expenditure shall be preceded by a financing decision adopted by the Commission pursuant to Article 26 of the Implementing Regulation.

the relevant EU Delegation.²⁴⁸ In any event, the EU and its institutions are not practically engaged with the implementation of the development strategies of EU development policy. Hence, the security or conflict resolution dimension of EU development policy differs from the CSDP dimension in that the latter entails the EU's practical engagement as discussed in Chapter Six. The questions that arise with regards to coherence in their interaction are also discussed in that Chapter.

3.4.2.2. Enforcement: Between the Commission and the Member States

Using the Implementing Regulation of the 11th EDF as an indicator, monitoring is the key method for enforcement. Article 16(2) of the Implementing Regulation for the 11th EDF provides that the Member States shall cooperate with the Commission so that the 11th EDF resources are used in accordance with the principle of sound financial management. Otherwise, the Commission shall monitor the use of 11th EDF assistance by the ACP States, and the implementation of projects financed by the 11th EDF, having particular regard to the objectives referred to in Articles 55 and 56 of the ACP-EU Partnership Agreement.²⁴⁹ Pursuant to Article 45 of the Implementing Regulation for the 11th EDF, the Commission shall provide the Member States with information on the operational implementation of 11th EDF resources as foreseen in Article 18 of the Implementation Regulation. The Commission shall also send that information to the Court of Auditors in accordance with Article 11(6) of the Internal Agreement.

²⁴⁸As discussed in 2.5.3.6. above, the EU Delegations administer development aid. However, the EU Delegations are not institutionally homogenous: '[...] Staff in delegations shall comprise EEAS staff and, where appropriate for the implementation of the Union budget and Union policies other than those under the remit of the EEAS, Commission staff [...]' (Council Decision, Article 5(2); also see Regulation (EU, EURATOM) 1080/2010 amending the staff regulations of Officials of the European Communities and the conditions of Employment of Other Servants of those Communities [2010] *OJ* L311/1, Article 96, second paragraph, which provides that an EEAS official working in a Union Delegation '[...] who has to carry out a task for the Commission as part of his duties shall take instructions from the Commission with regard to those tasks').

²⁴⁹Where it is concerned, the European Investment Bank (EIB) shall also engage in monitoring the management of the funds.

The HR/VP and the EEAS do not have any powers in this regard. This is surprising in so far as they are established to ensure coherence but do not have any monitoring or enforcement powers over and above the involvement of the EEAS in development policy programming. Arguably, this would detract from their potential oversight of coherence in the interaction between the distinct policies in general, and the coherence of other policies with development objectives in particular. It has been suggested that it would be particularly useful if a more intensive role could be played by EU Delegations in monitoring the actual effects of EU action in view of the knowledge gap observed above.²⁵⁰ They could do this in conjunction with the EEAS.

3.5. Mali Case Study

The framework of EU development cooperation policy has been discussed above. This section discusses Mali as a case study to illustrate EU development cooperation policy towards SSA. This is not to undermine the possible different dynamics and effects of EU development cooperation policy towards the different countries of SSA. However, as discussed in Chapter One, a case study enables a more direct analysis of law and practice. This case study of EU development cooperation policy towards Mali provides the benchmark against which coherence with other EU policies towards Mali will subsequently be measured including in the light of policy coherence for development. In so far as the institutional dimension of development cooperation policy is globally applicable to the region, the Mali case study focuses mainly on the instruments and objectives albeit not to the total exclusion of the institutional dimension. The latter will only be mentioned where it is necessary to buttress or emphasize a point.

²⁵⁰ECDPM *Discussion Paper*, No 129, April 2012, fn 242 above, p 10.

3.5.1. Of the old and new EU development cooperation with Mali: a contextual background

As discussed in Chapter One,²⁵¹ Mali's cooperation with the EU began in 1958 when it was one of the first SSA associates under Part IV of the Treaty of Rome.²⁵² The country became independent from France in 1960, and has been historically marked by poverty due to unfavourable geographical and economic demographics. The record of its poor development index started with its LDC status in 1971, but its location in the heart of a sub region disrupted by many conflicts has not helped its development projections and index. The poverty and security level of the country means that EU external action towards Mali is one that peculiarly requires a comprehensive approach, and this the EU has embraced over the years. However, the following analysis is focused on the most recent instrument of EU development cooperation with Mali, albeit not to the complete exclusion of relevant previous instruments. Indeed, a distinction can be made between the old EU development cooperation with Mali and the new. There is no complexity in this.

A reference to the old is just a way to acknowledge the EU's new approach to Mali in the wake of the violent security crisis that erupted in the country in 2012.²⁵³ Without any need to go further back in time, the old development cooperation with Mali could be represented with the Mali-EU instrument for development strategies preceding the current one.²⁵⁴ And without going into this instrument further than is necessary, it suffices to explain its core as is relevant for the depiction of the old that has been replaced by the new. Despite the controversy regarding the historical evolution of Mali's security crisis,²⁵⁵ there is no doubt that the country was stable

251See in particular Chapter One of this thesis at 1.0.

252Or what Hoebink describes as 'associationism' (see 3.2. above).

253See Chapter Six of this thesis.

254*Mali-Communaute Europeenne, Document de strategies pays et programme indicatif national pour la periode 2008-2013*, available at http://ec.europa.eu/europeaid/sites/devco/files/csp-nip-mali-2008-2013_fr.pdf, accessed 25 October 2015.

255See Chapter One of this thesis at 1.0.

prior to the manifestation of the recent crisis. It is therefore not particularly surprising that the 10th EDF (2008-2013) had a narrow focus with a concentration only on two areas. The first was governance, in particular support to state and public sector reform. The second area of focus was support for economic development in the three northern regions of the country.²⁵⁶ This is where the bridge happens between the old and the new. For with the start of the violent crisis, EU development aid funds were frozen especially when the al-Qaeda-linked insurgents seized control of the northern part of Mali in March 2012.²⁵⁷ Following a successful French-led intervention in January 2013, and the adoption by the Malian government of a 'roadmap for transition', the EU resumed its development aid programme for Mali in February 2013 in a move branded as 'a new European development aid doctrine' by EU diplomats.²⁵⁸ It has been suggested that this was part of the EU's 'new approach' to failed states.²⁵⁹ The re-establishment of development cooperation between Mali and the EU is branded as a new policy, as development funds are becoming available with fewer traditional strings attached.²⁶⁰ An EU diplomat is said to have captured it thus: "What is very interesting is that this is not the traditional conditionality, which is quite political or idealistic. Here the conditionality and the resumption of EU aid is gradual but with attention to priority needs. So the new doctrine differs from the previous doctrine."²⁶¹ Arguably, this is in line with the general new EU development policy as framed in the Agenda for Change discussed above. It is about differentiation based on

256 Beyond this line of development aid, the EU is also said to have been implementing a number of other projects and programmes, including in the fields of culture, regional integration, rural development and food security. Some of these extra assistant are said to be difficult to track due to the attendant complexity of the aid portfolio (see Loquai, C, 'Supporting domestic accountability in developing countries: Taking stock of the approaches and experiences of German development cooperation in Mali', ECDPM *Discussion Paper* No 115, July 2011, p 52). In any event, these are immaterial to the coherence discourse in the context of these thesis.

257 See Chapter Six of this thesis.

258 See 'Europe takes a 'new failed' aid states approach in Mali', EurActive France, 13 march 2013, available at <http://www.euractiv.com/development-policy/mali-new-eu-development-approach-news-518404>, accessed 12 September 2015.

259 Ibid.

260 Ibid.

261 Ibid.

needs albeit with a paradoxical requirement that national development plans align with EU development objectives and fundamental values. In this regard, the most immediate needs in Mali as identified by the EU include police, security and justice as well as the resumption of basic public services such as water, health and education. Another priority identified is the need for “roads to open up areas” in the north of Mali and 'anything that can help reconciliation between peoples'.²⁶² It is noteworthy that not all of these are covered in the NIP for which there is a limit regarding the number of focal points to be covered as will now be discussed.

3.5.2. The EU-Mali NIP²⁶³: the more-specific instrument of objectives of EU development cooperation policy towards Mali

As discussed above, the new EU development policy is differentiated in approach and is based on the level of development with a partner country or region. The differentiation is therefore related to development policy strategies and objectives, and to the allocation of aid for these purposes. This means that the EU's development policy towards a country or a region can only be deciphered from the country-specific or region-specific instrument on the EU's specific approach to the country or region. In order to be able to assess the coherence of EU external policies, especially in the light of the requirement of policy coherence for development using a country case study, a determination of the specific instrument and objectives of EU development policy towards the country is inevitable.

In contrast to the instruments and objectives of EU development policy towards a country or region, the institutional dimension of programming for EU development policy is global in approach. In this regard, it can be argued that it is the institutional process discussed above that

²⁶²Ibid.

²⁶³*Union Européenne – Mali Programme Indicatif* National 2014-2020.

would apply to the determination of the EU-Mali NIP. It does not make any difference that the EU-Mali NIP for the 11th EDF did not mention the EEAS at all, but rather refers to the joint programming process in which the European Commission and Mali undertook a national situation analysis to identify the key development concerns and the strategies to tackle them.²⁶⁴ From a legal perspective, it is noteworthy, that the NIP is adopted in accordance with Article 2 and Article 4 of Annex IV to the Cotonou Agreement. Substantively, the NIP stresses that its objectives tallies with Mali's National Development Strategies as illustrated by both the text and the process of formulation of the NIP. In this regard, the focal sectors identified in the NIP meet the development priorities of Mali as set out in the Plan for the Sustainable Recovery of Mali 2013-2014 (PRED), and in the Government Action Plan 2013-2018.²⁶⁵ These priorities are based on the challenges currently facing Mali²⁶⁶ as discussed above. It is these challenges which traverse economic, social political and security problems that form the strategic objectives of the current EU development policy towards Mali. With regards to the specific objectives, there are three main priorities namely 1) human rights, democracy and good governance; 2) inclusive and sustainable growth for human development and security; and 3) gender equality. The NIP acknowledges that these correspond the European Consensus and the values promoted in the Agenda for Change. Indeed, the latter requires that the new development policy towards any country or region will only cover three focal sectors, except in situations of fragility where a fourth sector can be considered. Indeed, a fourth sector on infrastructure was added in the current EU-Mali NIP because of the strategic interest of this sector in the situation

264Ibid.

265 *Union Européenne – Mali Programme Indicatif National* 2014-2020, p 8.

266Ibid. For the relevant national instruments see respectively République du Mali, Plan pour la Relance Durable du Mali 2013-2014, Version Finale, 07 Mai, 2013, available at http://www.maliapd.org/IMG/file/pdf/DOCUMENTS_CLES/12.%20PRED/Plan_pour_la_Relance_Durable_du_Mali_VF.pdf, accessed 12 July 2015, and République du Mali, Primature, Cabinet du premier Ministre, 'Programme d'Actions du Gouvernement (PAG), 2013-2018', November 2013, available at www.primature.gov.ml/images/PAG_2013-2018.pdf, accessed 12 August 2015.

the country is currently experiencing.²⁶⁷ This is a clear illustration of differentiation.

With specific regards to coherence, the NIP emphasises the need for the EU to compulsorily make a coherent and complementary use of all the instruments available to it to support Mali's development efforts.²⁶⁸ Specific reference is made to the CSDP as an example. This is not surprising in the light of the security-development nexus. Invariably, the intimate link between security and development means that the question of coherence between the pair is generally at the fore front of the coherence discourse. The practice also illustrates good reasons for this. For example, while highlighting the daunting challenge of coherence in conflict-affected and fragile states, DAC specifically stresses in a review that more coherence is required between the CSDP and the EU's longer term development programming.²⁶⁹ Ironically, the Sahel Strategy which links 'security and development' in the light of the security-development nexus was not mentioned in the EU-Mali NIP. This is striking as it has been suggested that the real indicator to assess the ethos and ideas of linking 'security and development' it espouses will be how much of these will make their way into the country and regional strategies.²⁷⁰ However, while this brings to mind the argument that the Strategy lacks political clout and engagement,²⁷¹ it has to be remembered that a lack of reference to a strategy is not necessarily an indication that its

²⁶⁷*Union Européenne – Mali Programme Indicatif National 2014-2020*, p 8. This was added at the express request of Malian authorities.

²⁶⁸*Ibid.*, p 9.

²⁶⁹DAC Review, 2007, fn 194 above, p 68. The main case study used for an example in the DAC review was the DRC which prior to the Mali crisis was the key topical case study in the study of the CSDP practice and its coherence with other EU external policies, especially long term development programming. Similar to the case of the DRC, the EU's priority in Mali as stressed in the NIP is to encourage the development and stabilisation of Mali in the long term (*Union Européenne – Mali Programme Indicatif National 2014-2020*, p 9).

²⁷⁰Sherriff, A, 'The EU Strategy for Security and Development in the Sahel – An indicator for the future of EU External Action?', ECDPM Talking Point Blog, 23 September 2011, available at <http://ecdpm.org/talking-points/eu-strategy-sahel-indicator-future-external-action/>, accessed 12 January 2015.

²⁷¹See Ould-Abdallah, A, 'Why the Sahel urgently needs an EU-backed security framework', Europe's World, 15 January 2014, available at <http://europesworld.org/2014/01/15/why-the-sahel-urgently-needs-an-eu-backed-security-framework/#.Vmpk2oR0N0s>, accessed, 14 January 2015.

objectives are not taken into account.²⁷² It is noteworthy that violent conflict is not programmable.

With regards to trade, the NIP indicates that trade, along with regional integration will be facilitated by the EPAs. Further in this regard, it notes that the regional EPA will govern all commercial relations and aid for trade between the EU and Mali. It can be argued that this is another indication of the separation of trade from development by the EU. However, the requirement that trade respects the objectives of development in the light of policy coherence for development was not specifically mentioned in the EU-Mali NIP. Of course this does not hold the implication of absolving trade from the primary requirement of policy coherence for development. It also does not mean a submission to the view that the requirement is impossible.²⁷³ In contrast, it can be argued that this could stem from a belief that EU trade policy towards Mali is already coherent with development objectives.²⁷⁴ Indeed, the EU's Everything But Arms (EBA) initiative which is considered a development-oriented trade policy instrument for Least Developed Countries (LDCs) equally applies to Mali as an LDC.²⁷⁵ In this regard, the position of the EU-Mali NIP that the EPA will govern the trade relations between the EU and Mali is noteworthy as it highlights the relevance of the EPAs to the coherence discourse in the context of this study.²⁷⁶

²⁷²For example, it is clear that some of the areas covered in the NIP centre around some of the four complementary lines of action articulated in the Sahel Strategy (see Sherriff, fn 259 above for the view that the Sahel Strategy mainly recasts and links existing initiatives). As will be remembered from fn 257 above, the EU runs a complex aid portfolio in Mali covering different areas.

²⁷³See Chapter Two of this thesis.

²⁷⁴Of course, as discussed in Chapter Four, the coherence of trade policy with development objectives is invariably a question of extent (and the coherence of trade with development objectives is a different question from the coherence of the Common Agricultural Policy - which is an internal policy - with development or even trade policy).

²⁷⁵Ibid.

²⁷⁶Ibid.

As mentioned in Chapter One, Mali's high level of aid dependency for fighting poverty has made it a donor's darling and a "testing ground" for new aid modalities. In terms of aid allocation, it has been suggested that Mali averagely receives some 1.5 per cent of total EU aid to the ACP, with EU aid accounting for 10 per cent of total Overseas Development Assistance (ODA) received by Mali.²⁷⁷ While this has not been confirmed in the course of this study, the result would not make any difference to the issue of coherence as examined in this thesis. Overall, this EU development policy towards Mali as crafted in the NIP, and the institutional dimension as provided in the primary legal instruments provides the benchmark for determining the coherence of other EU external policies with EU development policy towards SSA. However, being able to trace the contours of EU development policy towards Mali or being able to draw out its objectives is not the same as to say that a determination or assessment of the coherence of other EU external policies with the former is a simple task. As discussed above, not only is development an indefinite concept, its metonym poverty reduction or eradication are equally concepts that are difficult to measure and have understandably not been defined by the EU.²⁷⁸ Furthermore, there is in general a lack of sufficient evidence on the actual effects of EU policies in developing countries due to lack of investment in research.²⁷⁹ In this regard, it is arguable that the only possible assessment that can be conducted in this regard, at least for now, is the assessment of how the instruments of these other policies demonstrate that they have taken account of development objectives. It does not matter that this is a minimalist approach. In any event, the question of the coherence of other EU external policies with development objectives will at all times be a question of extent. Of course, this is different from the question of the overall coherence of the policies *vis-a-vis* synergy in the sequencing of available policy

277Brigaldino, G, 'Managing European Aid Resources in Mali' in Carlsson, J, *et al*, (ed.) *Foreign Aid in Africa: Learning from Country Experiences* (Nordiska Afrikainstitutet, 1997), p 132.

278See Khaliq, fn 9 above, p 120.

279ECDPM Discussion Paper, No 129, April 2012, fn 242 above, p 10.

option towards 'an all EU' approach.²⁸⁰

3.6. Conclusion

The Chapter set out to analyse EU development policy towards SSA as a distinct field of EU external action towards the region with a view to a subsequent determination of coherence, especially policy coherence for development. This meant ultimately separating it from trade which it is historically and legally entwined with in this context. In general, it is submitted that the post-Lisbon law and practice render more plausible the argument that EU development policy towards SSA has always been separable from EU Trade Policy towards the region despite the historical intertwining of the two in the successive association agreements that regulates EU external relations with SSA. Both the theoretical framework of the Chapter and the Mali case study illustrate that EU development cooperation including in the context of EU external action towards SSA revolves mainly around development assistance by means of financial aid for strategies aimed at poverty eradication and sustainable development. In this regard, the analysis further illustrates that although there is a central objective of EU development policy in general, the objectives and strategic priorities of EU development policy towards SSA centre on the distinct development needs and interests of the relevant recipient sub-geographic regions and countries of SSA. This is either mutually agreed or unilaterally determined by the EU, but in a process distinct from the procedure for the determination of EU trade policy towards the region as discussed elsewhere in this thesis. Against this background, it is posited that both the specific strategic objectives as stipulated in the relevant region or country-specific instruments and the general objective of EU development policy (the reduction and eradication of poverty) are

²⁸⁰See Chapter One of this thesis at 1.3.

relevant to the determination of the coherence of other policies with development objectives depending on the EU policy for which policy coherence for development is assessed. In general, the Chapter provides the crucial benchmark that will facilitate comparison with the selected relevant strand(s) of EU external action towards SSA with a view to determining their coherence, including in the light of the requirement of policy coherence for development. In doing this, the Chapter discussed the norms, instruments and institutional dynamics of EU development policy towards the region, and especially highlighted the active involvement of the post-Lisbon body for coherence namely, EEAS in the procedure for development policy. These will enable a subsequent analysis of coherence across the identified EU policies towards the region, albeit with a specific focus on the requirement of policy coherence for development, and starting with the EU trade policy towards the region. This is the focus of the next Chapter.

Chapter Four

4.0. EU Trade Policy towards Sub-Saharan Africa: between trade interests and development objectives

4.1. Introduction

The previous Chapter demonstrated that EU development policy towards SSA is distinct from EU trade policy towards the region. There is no need to repeat the distinction-infused introduction provided in that Chapter in this introduction. In contrast, it suffices to emphasise the distinction of trade policy as recently expressed by the EU in a key policy instrument: “Trade policy has its own distinct economic logic and contribution to make to the external action of the Union [...]. So the Union’s trade and foreign policies can and should be mutually reinforcing. This applies to areas such as development policy [...]”.¹ This does not only distinguish trade policy from development policy but also reaffirms the need for coherence between the former and other policies including development policy. However, this is only a reference to the general requirement of coherence between EU external policies. As will be remembered from the last two Chapters,² it is clear that other EU policies including trade are required to be coherent with development objectives over and above the reinforcement of each other towards the construction of a united whole.

In line with the objectives of this thesis, this Chapter has one major aim. It provides analysis of EU trade policy towards SSA with a view to determining its coherence or extent of it, with development policy especially in the light of policy coherence for development, and using Mali

¹Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Trade, Growth and World Affairs. Trade Policy as a Core Component of the EU’s 2020 Strategy, COM (2010) 612 final [hereinafter the 2020 Strategy].

²Chapters Two and Three.

as a case study.³ The analysis is also necessary for the purposes of completeness in the determination of coherence *vis-à-vis* synergy in the sequencing of available policy options. Trade policy is being investigated immediately after development aid policy because it is entwined with the latter under the original approach of EU external relations with SSA as discussed elsewhere in this thesis.⁴

It is submitted that post as pre-Lisbon, the EU trade policy towards SSA remains distinctly specific even while embracing the nexus between trade and development. This specificity despite the amalgamation of EU external objectives at Lisbon is most clearly illustrated by the exclusion from trade policy, of the post Lisbon institution and body for coherence namely the High Representative for Foreign Affairs and Security Policy (HR/VP) and the European External Action Service (EEAS) in the former's service. Against this background, it is argued that while the pre and post-Lisbon institutional bifurcation between EU trade policy and its development policy could compromise the coherence of trade norms with development objectives, the overall specificity of trade policy means that even institutional coherence will not prove an eternal panacea for the former. Furthermore, while highlighting the institutional potentials to enhancing the coherence of trade with development objectives despite the exclusion of the HR/VP and the EEAS, it concludes that the coherence of trade policy with development objectives beyond the acknowledgement of the need for same in the instruments of trade policy ultimately depends on the political will of the EU Member States. Nevertheless, it concedes that this is at all times a question of extent, and one whose answer may be as much difficult to determine as it will continue to be mired in controversy.⁵ This is mainly because of

³See Chapter Two of this thesis.

⁴ See Chapters Two and Three of this thesis.

⁵Invariably, this is different from the question of the overall coherence of EU policies towards SSA which is mainly a question of synergy and coordination as well as a sequential implementation of EU policies towards the

the sophisticated and complex nature of the interaction between trade and development in instrument and in practice as the Mali case study further illustrates, and also because of the indeterminacy of the requirement of policy coherence for development including with specific regards to trade, in EU external relations law.⁶

This Chapter is divided into four sections. The first section provides the contextual background to EU trade policy, and pertinently analyses the legal basis and the scope of its objectives with special reference to SSA. The latter also defines the limits of the scope of the analysis.⁷ The second section presents a pertinent overview of the instruments of EU external trade policy with special reference to SSA. This is followed by the discussion of the institutional dimension of EU trade policy with special reference to the region. This covers the institutional procedure both for unilateral and conventional instruments.⁸ With regards to the latter, the focus is primarily on the institutional procedure for trade policy-making in so far as this is the contemporary practice in the context of EU trade policy towards SSA *vis-a-vis* the evolving Economic Partnership Agreements (EPAs).⁹ However, in doing this, the dimension of the

construction of a united whole (see Chapter One of this thesis at 1.3.).

⁶The indeterminacy of policy coherence for development in general is discussed in Chapter Two of thesis at 2.5.

⁷See for example Eeckhout, P, *EU External Relations Law* (OUP, 2nd edn.), p 448, where he explains that the scale and scope of aspects of EU trade policies is such that their studies cannot all be undertaken in even a book Chapter. ⁸*Ibid*, p 447.

⁹The EPAs are trade agreements which the EU and its African, Caribbean and Pacific (ACP) partners agreed under Article 36(1) of the Cotonou Agreement to negotiate in order to bring their previously waived historical trade relations to conform with the rules of the World Trade Organisation (WTO) as required (see 4.3.1. below). The WTO administers the contemporary multilateral trade agreements, settles disputes, provides a forum for new trade negotiations, surveys national trade policies and cooperates with other international bodies in drawing up of economic policies at the global level. It is noteworthy that WTO supersedes the General Agreement on Tariffs and Trade (GATT), a post-war period organisation set up in 1947 to help regulate the international economy and prevent a recurrence of the disastrous protectionist policies undertaken between the two World Wars. GATT was charged with overseeing international trade in goods and, in particular, the liberalisation of this trade by means of a negotiated reduction in tariff barriers. The GATT has been superseded by the WTO since 1995 with the latter maintaining the relevant GATT rules (Moussis, N, *Access to European Union law, economies and policies* (Rixensart: Euroconfidentiel, 19th edn.), 23.4. available at http://europedia.moussis.eu/books/Book_2/7/23/04/index.tkl?lang=en&all=1&pos=340&s=1&e=10, accessed 14 January 2015. As mentioned in Chapter One, EU external action in the WTO is outside the scope of this thesis. However, this does not mean that reference to WTO is completely eschewed from this thesis. Indeed, some of the GATT-WTO rules are pertinent to this analysis, and there is no doubt that the WTO is a veritable legal framework

institutional procedure in the context of association agreement is also highlighted.¹⁰ Indeed, in so far as this analysis is with a view to determining coherence in the interaction between trade and development, it can be argued that the difference between the two policy-making procedures does not affect the result of the interaction between trade policy and development objectives as much as the institutional dichotomy between the two within the Commission.¹¹ Of course, this is not to say that institutional coherence would be an eternal panacea to any incoherence between trade and development.¹² Nevertheless, in contrast to the institutional procedure for conventional instruments, the institutional procedure for unilateral instruments is relevant because of the application of the unilateral EU instrument to the country of case study namely Mali. Significantly, the unilateral instruments could also potentially apply to the region as a whole, as could the conventional EPAs.¹³ The fourth and final section centres on Mali as a case study.¹⁴ In so far as the institutional dimension is globally applicable to the region, the Mali case study focuses mainly on the pertinent instruments and norms of trade policy towards SSA as they apply to Mali.¹⁵ In particular, the position of Mali in-between the relevant EPA and the unilateral EU trade regime that applies to the country namely the Everything But Arms (EBA) is pertinently analysed in the light of policy coherence for development. The two different regimes could potentially apply to SSA as a whole. However, the focus of the analysis in this last section is completely on Mali and the peculiarity, or lack thereof, of the potential

for EU trade policy including in its relations with SSA.

10As discussed in the previous Chapter, the policy-making for trade policy would usually end at this stage with no further need for implementation in contrast to development aid (see Chapter Three at 3.4.1. above).

11See 4.4. below.

12See the following analysis.

13See the following analysis. The EPAs are differentiated according to the different economic groupings and sub-regions within SSA (see Annex III attached to this thesis).

14See 4.5. below.

15The complexity of the issues at stake and the sophisticated nature of EU trade policy means that a pertinent focus is required within the limited confines of this Chapter. Indeed, the indeterminacy of the requirement of policy coherence for development especially with regards to trade means that a one by one analysis of the provisions of the relevant norm and instruments is as irrelevant as it is impossible within the limited confines of this Chapter.

implications of these trade instruments and their norms on the objectives of EU development policy towards the country.¹⁶

4.2. The legal basis, scope of objectives and instruments of EU trade policy with special reference to SSA

The aim of this section is to discuss the legal basis and scope of objectives of EU trade policy with special reference to SSA. Invariably, the legal basis is imperative in so far as the thesis is first and foremost a legal analysis. However, both the legal basis and the objectives will aid the assessment of coherence with development policy, as well as provide a pertinent background for the subsequent analysis of the institutional structure and the instruments of EU trade policy towards SSA. Nonetheless, prior to a discussion of the legal basis and the objectives, it is imperative to provide a brief contextual background of EU trade policy as it relates to the focus of this thesis.

4.2.1. EU trade policy and the coherence of EU external action: a pertinent background

As indicated elsewhere,¹⁷ opinions vary regarding which EU external policy is the EU's external anchor. With specific regards to trade, it has not only been considered the EU's *raison d'être*,¹⁸ but also Europe's most important contact with the world outside its borders.¹⁹ In general, whatever other reasons there may be for Europe's integration, it can be argued that trade was

¹⁶As discussed in Chapter Three of this thesis. It is noteworthy that this does not entail an assessment of the Union's success at achieving broad development goals which Peers explains is a question that lies beyond the scope of a legal analysis and rather one for policy analysts (see Peers, S, Fragmentation or Evasion in the Community's Development Policy? The Impact of *Portugal v Council* in Dashwood, A, and Hillion, C, *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), p 112).

¹⁷See Chapter Three of this thesis at 3.2.

¹⁸See Chapter Two of this thesis at 2.1. and Chapter Three at 3.2.

¹⁹DG Trade, European Communities, 'What is Europe's Trade Policy?' (Publications Office, 2009).

the principal element at the heart of it,²⁰ and also the key driver of the integration process.²¹ Similarly, it could be concluded that the external aspects of trade are also at the core of the Union's interaction with the outside world.²²

In contrast to development policy which was discussed in the previous Chapter, there is no controversy regarding the evolution of the EU's competence for external trade. However, historically, the Treaties do not make direct reference to 'EU trade policy'. Rather, EU trade policy is framed within the context of the Common Commercial Policy (CCP).²³ As will be recalled from Chapter Two of this thesis, the CCP was imperative for the external protection of the developing internal market with uniform measures.²⁴ The establishment of the CCP was based on three principles namely, a common external tariff, common trade agreements with third countries and the uniform application of trade instruments across Member States.²⁵ A customs union where all restrictions are removed in trade between Member States required a single external border and a distinct single trade policy²⁶ towards the different parts of the world.²⁷ It also required a single voice within the modern international system of trade rules as primarily regulated by the WTO.²⁸ Due to its normative and practical proximity to the goal of

20See Chapter Two of this thesis.

21See Okigbo, P, C, N, *Africa and the Common Market* (London: Longman, 1967), p 17-22 where he listed the different types of economic grouping tried in Europe prior to the establishment of the Common Market.

22Or at the centre-piece of EU's external policies (see Eeckhout, fn 7 above, p 439).

23See Title III of the TFEU on the CCP; also see Eeckhout, fn 7 above, p 447.

24The key provisions of which are presently in Article 28 TFEU (ex-Article 23 EC, ex-Article 9 EC) and Article 30 TFEU (ex-Article 25, ex-Article 12).

25 Meunier, S, and Nicolaidis, K, 'The European Union as a Trade Power' in Hill, C, and Smith, M, (ed.) *International Relations and the European Union* (OUP, 2005).

26See 'What is Europe's Trade Policy?' (Publications Office, 2009), fn 19 above.

27This was required by the definition of a customs union in the GATT (see fn 9 above). On the relations of customs union to the growth of trade see GATT, Article XXIV, para 8(a); also see Viner, J, *The Customs Union Issue* (New York: Carnegie Endowment for International Peace, 1950); and Meade, J, *The Theory of Customs Union* (Amsterdam: North-Holland, 1955); Lipsey, R, G, *The Theory of Customs Union: a General Survey* (1960) 70 *Economic Journal* 279, 496 – 513.

28See fn 9 above.

the internal market, the CCP, and hence trade was made a field of exclusive EU competence right from its origin.²⁹ This exclusivity has been further reaffirmed at Lisbon with previously contested aspects of the CCP brought under the exclusive competence of the EU.³⁰ In general, the essence of exclusive EU competence is that the Member States no longer have any power to legislate on trade matters or conclude international trade agreements.³¹ Nonetheless, this is only in principle. For as Eeckhout especially notes, this needs to be qualified with regards to practice.³² EU external trade policy interacts with other aspects of foreign policy wherein the competence of the Member States subsists. For example, in the specific case of SSA, trade policy does not only occasionally interact with the CFSP and the CSDP,³³ but also traditionally interacts with development policy as discussed in Chapter Three.³⁴ These are fields of EU external policy wherein the competences of the Member States subsists in varying dimensions but in any event with the direct implication that Member States are directly involved in policy-making or implementation as may be required. This is a clear reflection of the EU's *Staatenverbund* character and perhaps the overall flexibility of EU external relations law and practice.³⁵ It follows that with specific regards to trade, the EU's exclusive competence does not mean the complete exclusion of EU Member States from policy-making and implementation. The development leading to the involvement of EU Member States especially in the context of EU external relations with SSA has been discussed in Chapter Three and will

²⁹Article 3(1)(e) TFEU.

³⁰Former exceptions which came under exclusive EU competence at Lisbon include sensitive areas such as trade in cultural, social, educational, and health related services.

³¹Only the EU can legislate in these regards (see Chapter Two of this thesis on the delineation of EU external competences).

³²See for example Eeckhout, fn 7 above, p 439.

³³See in general for example, Larik, J, 'Much More than Trade: the Common Commercial Policy in a Global Context' in Evans, M, and Koutrakos, P, *Beyond the Established Legal Orders* (Oxford: Hart, 2011). Indeed, in general, EU trade policy interacts with overall EU foreign policy (see for example Koutrakos, P, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart, 2001); Leal-Arcas, R, 'The European Union's new common commercial policy after the Treaty of Lisbon' in Trybus, M, and Rubini, L, (ed.) *The Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham: Edward Elgar, 2012), especially p 277.

³⁴Also see Chapter Two; and more generally the following analysis.

³⁵See Chapter two of this thesis.

not be repeated here.³⁶ Suffice it to state that this involvement of EU Member States, whether avoidable or not, holds implication for the coherence of EU external action towards SSA in particular. However, this may not always be about the historical relations between some EU Member States and the region as discussed elsewhere.³⁷ Contrastingly, with specific regards to the coherence of trade with development objectives, it can be argued that this is in general about the trade and economic interests of EU Member States.³⁸ This does not detract from the assertion that the coherence of trade norms with development objectives is at all times a question of extent especially in the light of the indeterminacy of the requirement of policy coherence for development in this context.

Although a detailed analysis of the EU's activities within the WTO is outside the scope of this thesis, references to the WTO cannot be completely excluded from this thesis.³⁹ This is because the EU's bilateral trade policy is in practice shaped by the modern international system of trade rules as primarily regulated by the WTO. In general, the blue print and evolution of the CCP had taken place against the backdrop of the GATT rules which has been superseded by the WTO rules.⁴⁰ Suffice it to state that EU trade policy including towards SSA has evolved in tandem with the developments in the multilateral system of trade rules since the era of association under

³⁶Apart from this qualification, the general position is that the determination of trade rules, and the negotiation and conclusion of trade agreements is an exclusive EU competence, whether these are at the bilateral level with regions and countries or at the multilateral level within the WTO framework.

³⁷See Chapter Two of this thesis, especially at 2.2.4.

³⁸Of course, this is not to say that EU Member States all have the same views regarding EU's external trade (see 4.4.2.2. below especially fn 215). But in general, the benefits of external trade is for all EU Member States as a result of free movement of good, and ultimately ensuring the coherence of EU trade with development objectives would require EU Member States to sacrifice some of their trade interests (see Khaliq, U, *Ethical Dimensions of the Foreign Policy of the European Union A Legal Appraisal* (Cambridge University Press, 2008), p 139; also see the following analysis). It is noteworthy that this is different from the question of coherence across EU policies which is not generally for a lack of resolve on the part of the Member States, the EU, and its institutions but could be put down to deeper structural causes bordering on institutional and legal limitations. (See Chapter 8 of this thesis).

³⁹See fn 9 above.

⁴⁰Ibid.

the Treaty of Rome.⁴¹ However, it can be argued that this a mutually reinforcing process seeing as there are developments in the multilateral system of trade rules that may have been preceded with developments in the EU. For example, although the modern international multilateral system of trade rules as conducted under the auspices of the WTO has come to advocate the idea that trade policy generally 'is no longer about trade',⁴² this 'developmentalisation' of international trade or the attempt to 'developmentalise' international trade was preceded by the EU's trade-driven poverty alleviation approach⁴³ especially towards SSA.⁴⁴ Generally, the EU remains an exponent of the theory that 'trade is development'.⁴⁵ However, whether it is still leading in this regard is another matter. As the following analysis illustrate, EU trade policy, including towards SSA has evolved. The substantial evolution of EU trade policy especially with regards to its objectives is not neutral to the question of coherence in EU external action towards SSA. Nonetheless, it is noteworthy that trade raises questions regarding policy coherence for development for which there are no easy answers. For example, trade is first and foremost a commercial policy with commercial and economic aims albeit required to take into account development objectives in the light of the asymmetrical economic relations between the developed and the developing worlds.⁴⁶ This raises a question regarding the extent of the link required between trade and development for trade policy to be adjudged coherent with development objectives. This is a question to which there are no easy answers, and to which it

41See Chapter Two of this thesis at 2.2.4.

42Under the auspices of the United Nations Conference on Trade and Development (UNCTAD) an organisation born out of frustration with the GATT system's perceived inability to respond to developing country concerns (see <http://unctad.org/en/Pages/Home.aspx>, accessed 12 September, 2015). The First UNCTAD was held in 1964.

43See Khaliq, fn 38 above, p 130 where he talks about the EU's trade-driven poverty alleviation approach.

44See the successive agreements signed in the context of EU external relations with SSA from the Yaounde Conventions to the Cotonou Agreement (see Chapter One of this thesis at 1.0 above, in particular, fns 29 and 31); also see in general the following analysis.

45European Commission, 'How economic partnership agreements benefit both consumers and producers in Europe and developing countries', p 2, http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151010.pdf, accessed, 12 January, 2014

46Illustrative is the successive Trade and Development Rounds of the WTO which have been part of international trade for more than 50 years. The (current) Doha Round was launched in 2001 as a direct successor of the previous Uruguay rounds (see 'What is Europe's Trade Policy?', fn 19 above).

is unsurprising that the EU has not provided any clarification. Overall, the paradoxical relationship between trade and development and their existence in what have been described as 'a sort of an uneasy *melange*⁴⁷ mark their interaction not only in the field of EU external relations law and policies⁴⁸ but also in the context of the modern international multilateral system of trade rules.⁴⁹ Nevertheless, it is widely agreed that trade should not impact negatively on development, and should in fact promote the latter in the light of policy coherence for development. This may be more so in the context of EU external relations law and policies where although largely indeterminate, policy coherence for development is particularly a legal requirement with a strong political impetus.⁵⁰

4.2.2. The legal basis for EU trade policy

EU trade policy is framed within the context of the CCP which has a wide scope.⁵¹ Pre-Lisbon,

47Pilegaard, J, *Between coherence and fragmentation: the EU's everything but arms initiative* (Copenhagen: Political Studies Press, 2006), cited in Elgstrom, O, and Pilegaard, J, 'Imposed Coherence: Negotiating the Economic Partnership Agreements' (2008) 30 *EI* 3, 363 – 380, p 370.

48Ibid., also see for example Carbone, M, 'Mission Impossible: the European Union and Policy Coherence for Development' (2008) 30 *JEI* 3, p 323-342; Heydon, K, 'Trade and Development: Some implications for EU Trade Policy' in *The Next Decade of EU Trade Policy: Confronting the Challenge* (London: ODI, 2012), p 24 - 25; and Mold, A, and Page, S, 'The Evolution of EU Development Policy – Enlargement and a Changing World' in Mold, A, (ed.) *EU Development Policy in a Changing World: Challenges for the 21st Century* (Amsterdam University Press, 2007), p 11-28.

49See for example, *Trade Negotiation Issues in the Cotonou Agreement, Agriculture and Economic Partnership Agreements* (New York: United Nations Conference on Trade and Development (UNCTAD), 2003), p 3; and Rodrik, D, and Rodriguez, F, 'Trade Policy and Economic Growth: a Skeptic's Guide to the Cross-National Evidence', NBER *Working Paper* 7081, April 1999 (May 2000, ed.) (New Jersey: Institute of Advanced Studies, School of Social Science,), p, 6-7, available at <https://www.sss.ias.edu/files/pdfs/Rodrik/Research/trade-policy-economic-growth.pdf>, accessed 06 January 2015.

50See Chapter Two of this thesis at 2.5.3.; and in particular EU Commission of the European Communities. 2005, 'Communication from the commission to the Council, the European Parliament and the European Economic and Social Committee', *Policy Coherence for development, Accelerating progress towards attaining the Millennium Development Goals*, COM (2005) 134 Final, Brussels, para 3-4.

51For a detailed analysis of the scope of the CCP including in the wake of the Lisbon amendment, see Leal-Arcas, R, 'The European Union's Trade and Investment Policy after the Treaty of Lisbon', (2010) 11 *J. World Investment & Trade* 463, 484–94 (2010); Leczykiewicz, D, 'Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade', (2005) 6 *German L. J.* 1673, 1674–78; Bungenberg, M, 'Going Global? The EU Common Commercial Policy After Lisbon', (2010) 1 *Eur. Yearbook Int'l Econ. L.* 123; Krajewski, M, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?* 42 *CML. Rev.* 91, 108–19 (2005); Van den Berghe, F, 'The EC's Common Commercial Policy Revisited: What does Lisbon Add?', (2009) 4 *Global Trade and Customs J.* 275 *et seq.*

the CCP was covered by ex-Articles 131- 134 EC. While ex-Article 131 established the objectives of the CCP,⁵² ex-Article 133 distilled the type of measures that could be adopted for the pursuit of those objectives under the framework of the CCP.⁵³ Effectively, ex-Article 133 was the substantive legal basis for EU trade policy pre-Lisbon. It embodied the EU's competence for the CCP and the mechanisms of the Union's external trade policy both in its bilateral and multilateral dimensions. In contrast, ex-Articles 133(2) and 300 EC embodied the procedural legal basis under that legal dispensation. In the post-Lisbon era, Article 207 TFEU (ex-Article 133 as amended) embodies the substantive and procedural legal basis for the CCP. Substantively, Article 207 TFEU (ex-Article 133 as amended) provides as follows:

‘The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements *relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. *The common commercial policy shall be conducted in the context of principles and objectives of the Unions’ external action.*’⁵⁴

The words in italics reflect the Lisbon amendments. These significant amendments subject the CCP to the sympathy of the principles and objectives of EU external action under Article 21 TEU, and in line with the amalgamation of EU external objectives in Article 21(2) TEU. Nevertheless, this provision on the CCP reflects the primarily commercial and economic nature of the CCP which is mainly about tariff rates, and tariff and trade agreements relating to the

⁵²See 4.2.3. below.

⁵³Ex-article 133: ‘The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.’

⁵⁴Article 207 TFEU (ex-Article 133 EC) as amended. The words in italics were added by the Lisbon Treaty.

many dimensions of contemporary international commerce. With specific regards to trade, the provision refers to trade in goods and services, the achievement of uniformity in export policy, measures of liberalisation and measures to protect trade.⁵⁵

Ultimately, the legal basis for EU trade policy is different from the legal basis for EU development policy as discussed in Chapter Three of this thesis. However, as discussed in that Chapter, in the context of EU trade and development cooperation with SSA, neither the substantive nor the procedural legal basis for EU trade policy is highlighted in the relevant trade and development instruments. This is due to the historical framing of this special trade and development cooperation under the framework of association agreement. It is not necessary to repeat the developments surrounding the use of association agreements in this context as this has been discussed in the previous Chapter. In contrast, it suffices to capture the essence of that analysis in order to focus the present analysis more appropriately. In this regard, it will be remembered that the circumvention of the question of competence for trade and development by means of mixity under the framework of association agreements imports the legal basis for association agreements into the equation.⁵⁶ Put differently, while Article 207 TFEU (ex-Article 133) at all times provides the legal authority for the EU's external trade negotiations, the specific

⁵⁵The last of this, namely measures to protect trade is outside the scope of this analysis, as are the commercial aspects of intellectual property, foreign direct investment (FDI), 'aid for trade' and the Common Agricultural Policy (CAP) which is validly a separate policy, and an issue which the Commission rightly or wrongly refuses to deal with as an aspect of the relevant instruments of EU trade policy in the context of EU external relations with SSA (see Berthelot, J, 'Why ECOWAS should not sign the EPA', *Solidarité*, 12 July 2014, p 2, available at http://www.academia.edu/7888087/Why_ECOWAS_should_not_sign_the_EPA_1, accessed 30 July 2015).

⁵⁶Article 217 TFEU (ex Article 310 EC). See for example, Council Decision (2010/648/EU) of 14 May 2010 on the signing, on behalf of the European Union, of the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005 [2010] *OJ L287*/1; also see a detailed analysis in Chapter Three of this thesis at 3.2.1.

type of trade agreement envisioned⁵⁷ affects the Treaty provision invoked.⁵⁸ By implication, where a legal basis bordering on the type of agreement is singularly chosen without any reference to Article 207 TFEU, controversy would arise regarding which policy is at least primarily engaged.⁵⁹ This was the situation in the pre-EPA trade and development cooperation in the context of EU external relations with SSA as discussed in the previous Chapter. Overall, whether the traditional practice of association agreement will continue is difficult to say.⁶⁰ In any event, as also discussed in that Chapter, what the latter course and the attendant embrace of policy-specific legal basis portend for coherence, especially policy coherence for development in the context of EU external relations with SSA may not be of much significance in comparison with the former practice.⁶¹ For whether trade and development are separated or entwined in instruments, neither do their institutional dimensions unite nor does the complexity and *uneasy melange* in their interaction wane. This is because EU trade policy has at all times been marked by specificity despite its interactions with broad foreign policy and strategic objectives.⁶² While the distinct institutional dimension of trade policy as discussed below illustrates the specificity of trade policy, the EPAs negotiated in the context of EU external relations with SSA as ever betray much about the existence of trade and development in an *uneasy melange*.

⁵⁷For example whether they are preferential or reciprocal, etc.

⁵⁸Aggarwal, V, and Fogarty, E, 'Between Regionalism and Globalism: European Union Interregional Trade Strategies' in Aggarwal, V, and Forgy, E, (ed.), *EU Trade Strategies: Between Regionalism and Globalism* (London: Palgrave Macmillan, 2004), p 28.

⁵⁹See Chapter Three of this thesis at 3.2.1.

⁶⁰But, it appears unlikely in the light of recent developments. Indeed, a departure from the traditional practice association appears imminent (see Woolcock, S, 'The potential impact of the Lisbon Treaty on European Union External Trade Policy', Swedish Institute for European Policy Studies (SIEPS), *European Policy Analysis*, 2008, Issue 8, p 1, available at <http://www.kommers.se/upload/Analysarkiv/In%20English/Analyses/Woolcock%20paper%20on%20impact%20of%20Lisbontreaty%20on%20tradepolicy.pdf>, accessed 15 November 2015).

⁶¹See 4.3.2., 4.3.3. and in general 4.4. below.

⁶²Including in the context of association agreements.

When it comes to these EPAs, the answer to the question of legal basis is equally not exactly clear cut. Even though these are primarily free trade agreements (FTAs) ultimately aimed at trade liberalisation,⁶³ practice shows that the legal basis for their conclusion in this context is not fixed and easily determinable. Arguably in keeping with the traditional development orientation of EU trade policy of EU trade policy towards its partners in SSA, the EPAs are framed within the Cotonou Agreement⁶⁴ as aspects of EU development instruments.⁶⁵ However, in the warm-up to the negotiation of EU-West Africa EPA, the Commission posited that the EPAs as foreseen in the Cotonou Agreement were about negotiating trade and trade-related issues only.⁶⁶ In this regard, the Commission explained that it did not have the mandate from EU Member States to enter negotiations or agreements on development assistance as part of an EPA.⁶⁷ Although things eventually took a different turn as could be seen with the West Africa EPA Development Programme (PAPED),⁶⁸ this development does not answer the question regarding the interaction between trade and development especially in the context of EU external relations with SSA.⁶⁹ Nevertheless, this does not mean that it may not help to explain

63FTAs are bilateral treaties that liberalize trade between the parties by abolishing nearly all tariffs and other obstacles to trade (Marceau, G, & Reiman, C, *When and How is a Regional Trade Agreement Compatible with the WTO?* (2001) 28 *Legal Issues of Econ. Integration* 297, 302). On the elements of FTAs see 4.4.1. below.

64See for example Doc. ACP/61/063/01 (DG E II) 'The ACP-EC Action Plans for the negotiation of the Economic Partnership Agreements in the Framework of the ACP-EC Partnership Agreement' as endorsed by the Joint ACP-EU Ministerial Trade Committee on 14 May 2001, Brussels, 23 May 2001.

65See Articles 34-37 of the Cotonou Agreement; and Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus on Development', [2006] *OJ C* 46/1 (hereinafter the European Consensus), para 36; also see Mandelson, P, 'Statement to the Development Committee of the European Parliament', Brussels, 17 March 2005.

66See ECDPM, 'EU Commitments on Aid for Trade and EPAs' (2006) 5 *TNI* 6, p 1.

67Ibid.

68See Council of the European Union, Council Conclusions on West Africa's EPA Development Programme (PAPED), Foreign Affairs Council meeting Brussels, 17 March 2014; also see Proposal for a Council Decision on the signing and provisional application of the Economic Partnership Agreement (EPA) between the West African States, ECOWAS and the UEMOA, of the one part, and the European Union and its Member States, of the other part /* COM/2014/0576 final - 2014/0265 (NLE), Document 52014PC0576, available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52014PC0576>, accessed 15 September, 2015 (hereinafter EU-West Africa EPA).

69The relationship between the EPAs and PAPED appears to be the same relationship between the successive agreements signed in the context of EU external action towards SSA and the EDF (see Council Conclusions on PAPED, fn 68 above, para 4 which points out that support for "PAPED will be delivered and implemented in the

the lack of uniformity in the legal basis for the EPAs. For example, although some of the earlier pre-negotiation instruments indicated Article 207 TFEU (ex-Article 133 EC) as the legal basis for the EPAs originating from the Cotonou Agreement,⁷⁰ the eventual EU-West Africa EPA have a combination of legal basis that includes Article 207 TFEU which is for trade, and Article 208 TFEU (ex-Article 177 EC) which is the legal basis for development policy.⁷¹ Indeed, in a 2008 Parliamentary Question, the European Parliament (the EP) had indicated that the proper legal basis for each (interim) EPA will be determined according to the content of the agreement concerned.⁷² In general, while the EPAs are FTAs and hence primarily trade instruments, the historical interaction between EU trade policy and development policy in the context of EU relations with SSA still trails them. However, this time around, the substantive legal basis for trade policy and development policy are reflected rather than circumvented with the legal basis for association agreements namely Article 217 TFEU (ex-Article 310 EC). However, this is not to say that it can be said with certainty on which legal basis the EPAs would in general all be concluded barring the primarily engaged legal basis for trade policy namely Article 207 TFEU.⁷³ In any event, it would be remembered that the pragmatism and flexibility embraced to

framework of the Cotonou Agreement, notably the 11th EDF National and Regional Indicative Programmes [...]; and also Ramdoo, I, and Bilal, S, 'Economic Partnership Agreements: West Africa Seals a Deal at the 11th Hour', ECDPM Talking Points blog, 27 January 2014, available at <http://ecdpm.org/talking-points/economic-partnership-agreements-west-africa-seals-deal/>, accessed 26 April 2015). On the EDF which is a development aid instrument *not a trade instrument per se* see Chapter Three of this thesis.

70See for example Council Decision of 20 November 2008 on the signature and provisional application of the interim agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part (2009/152/EC) [2009] *OJ L57/1* (having regard to Articles 133 and 181 in conjunction with the first sentence of the first subparagraph of Article 300(2) thereof); and Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the ACP provided for in agreements establishing, or leading to the establishment of the Economic Partnership Agreements [2007] *OJ L348/1*.

71See for example EU-West Africa EPA, fn 68above.

72Parliamentary Questions, Reply, [2009] *OJ C 999/ 01*. In this regard, the EP also indicated that the Council intended to conclude the interim EPAs with the members of the Caribbean Forum 'on the basis of Articles 57(2), 71, 80(2), 133(1), (5) and (6) and 181 in conjunction with the first and second subparagraphs of Article 300(3) of the EC Treaty.' These include the legal basis for trade, and other fields that are relevant for trade namely movement of capitals, transport, and economic, financial and technical cooperation. The latter which are also areas of exclusive EU competence are to be covered by the Agreement.

73There are also differences with the EPAs regarding 'non-exclusion' clauses (see for example See Lerch, M, 'Environmental and social standards in the Economic Partnership Agreement (EPA) with West Africa: A

manage complexity in the context of EU external relations with SSA extends to the question of legal basis.⁷⁴ Significantly, a major aspect of the complexity in this context is the interaction of trade and poverty alleviation or development in the objectives of EU trade policy – an interaction that could potentially enhance policy coherence for development in relation to trade, but may not equate to same adequately in practice.

4.2.3. The scope of objectives of EU trade policy with special reference to SSA: between commercial and development objectives⁷⁵

As discussed in Chapter Two, the amalgamation of the objectives of EU external action under Article 21 TEU does not mean that there are no longer specific objectives for the different strands of EU external action. In general, the first indication of the specific objectives of a policy is usually the legal basis bearing the EU competence to act in the particular field covered by the policy.⁷⁶ In the case of EU trade policy which is framed under the CCP, its explicit objectives can only be deduced from the general objectives of the CCP as enshrined in Article 206 TFEU (ex-Article 131 EC). The objectives of the CCP as are considered a necessary corollary to the customs union⁷⁷ are captured within the aims of the latter. In this regard, the aims of the customs union is 'to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'.⁷⁸ At the heart of

comparison to other EPAs', Directorate General for External Policies, *In-Depth Analysis*, prepared at the request of the European Parliament's Committee on Development, April 2015 available at [http://www.europarl.europa.eu/meetdocs/2014_2019/documents/droi/dv/303_expoida\(2015\)549040_/303_expoida\(2015\)549040_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/droi/dv/303_expoida(2015)549040_/303_expoida(2015)549040_en.pdf), accessed 23 October, 2015.

⁷⁴See Chapter Two of this thesis at 2.3.3.

⁷⁵The reference to development objectives here is not to suggest that trade policy interacts only with development policy. In contrast, the reference is made because of the historical direct interaction between the objectives of the two policies especially in the context of EU external relations law and policies.

⁷⁶See Chapter Two of this thesis at 2.3.3.

⁷⁷See Chapter Two of this thesis 2.1.

⁷⁸Article 206 TFEU (ex-Article 131 EC).

the explicit objectives spelt out in this provision is the liberalisation of trade and investment. The liberalisation of investment was codified at Lisbon. Contrastingly, the liberalisation of trade was there right from the origin in the Treaty of Rome.⁷⁹ Indeed, the origin of the objective of trade liberalisation as pursued in the GATT is the international political and legal background of the EU customs union.⁸⁰ Article 1 of GATT spells out the most-favoured-nation (MFN) principle which requires equal treatment of trading partners. However, GATT also provides for derogations from MFN to accommodate regional economic integration based on preferential terms of trade within the region concerned.⁸¹ Such regional integration must however take the form of a customs union or a Free Trade Area (FTA).⁸² While these two different regional trade arrangements hold different implications for the nations involved, both are ultimately fashioned to contribute to trade liberalisation and thereby avoid hindering trade. For example, FTAs are reciprocal preferential market access agreements which require the liberalisation of trade between the parties through the removal of quantitative restrictions and other barriers to trade, as well as the elimination of duties on "substantially all trade" within a "reasonable length of time" pursuant to Article XXIV GATT.⁸³ In the same vein, albeit contrastingly, the customs union include the prospects of a CCP and a common external tariff (CET),⁸⁴ and possibly a

⁷⁹See Eeckhout fn 7 above, p 11.

⁸⁰See fn 9 above.

⁸¹This is in recognition of the potential benefits flowing from closer integration as espoused in economic theory (see Viner, fn 27 above; for an alternative view see in general, Bhagwati, J, *The World Trading System at Risk* (London: Harvester Wheatsheaf, 1991) Ch. 5).

⁸²FTA is used in this Chapter for Free Trade Area. In contrast FTAs are used for Free Trade Agreements – the legal instrument for the former.

⁸³In practice, these terms remain loosely defined in the WTO, and there is yet no agreement among the major trading nations of the world regarding this (see Okigbo, fn 21 above, p 18, where he also explains that although 80% has been canvassed in the GATT discussions, this has not been generally accepted). As discussed below, this has in fact been a source of controversy in the EPA negotiations between the EU and some countries of SSA (see for example, Diouf, A, 'The ACP Advantage: Interpreting GATT Article XXIV and Market Access Implications for EPAs', (2009) 8 *Trade Negotiation Insights* 7).

⁸⁴In an FTA, each party retains autonomy in its commercial policy or tariff policy towards third countries. For more on the difference between customs union, FTA and other possible economic arrangements see Okigbo, fn 21 above, p 18 – 22.

deeper integration.⁸⁵ Evidently, the Fathers of the Union choose to set up a customs union.⁸⁶ This is the background to the objectives of the CCP and EU trade policy as expressly provided in the successive Treaties. And these objectives centre on trade liberalisation, and are primarily about market access and economic objectives.⁸⁷ These are different from the objectives of development policy which evolved in an *ad hoc* manner outside the Treaties⁸⁸ and primarily centre on poverty alleviation and eradication.⁸⁹ Of course, this last statement does not detract from the potentials of trade policy to contribute to development policy and foreign policy in the wider sense on the one hand, and from the potentials of trade instruments to serve as instruments of development policy and wider foreign policy on the other hand.⁹⁰ In fact, the WTO rules also allow the application of a General System of Preferences (GSP)⁹¹ to developing countries albeit without discrimination. However, this is different from the special trade preferences which have also been applied under the framework of the EU's trade-driven poverty alleviation approach especially towards SSA. This approach which is not necessarily related to policy coherence for

⁸⁵See Okigbo, fn 21 above, p 22; and Chapter Two of this thesis at 2.2. above.

⁸⁶Ibid. However, although the Union is a customs union, it could also enter into customs union agreements with other partners (see Eeckhout, fn 7 above, p 449). For example, it signed customs union agreements with Turkey and neighbouring micro-states in Europe such as San Marino and Andorra (see Cremona, M, 'The European Union and Regional Trade Agreements', in Hermann, C, and Terhechte, J, P, (eds.) (2010) 1 *European Yearbook of International Economic Law*, p 245; and the Commission's information on the 'Legal Framework(s) for Preferential Origin' available at http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_775_en.htm, accessed 24 March 2015).

⁸⁷Both the unilateral EU policies and FTAs illustrate this. And if this has always been implicit in some case, it is now made explicit in the European Commission, Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy, COM (2006) 567 Final, Brussels, 4 October 2006 (hereinafter Global Europe); and the European Commission, DG Trade, September 2013, 'Trade Negotiations Step by Step', in particular p 3.

⁸⁸See Chapter Three of this thesis at 3.1.

⁸⁹See Chapter Three of this thesis at 3.3.2.

⁹⁰See p 155 above.

⁹¹The GSP are preferences granted without reciprocity, and entails a partial or full reduction or suspension of customs duties on imports from developing countries (Eeckhout, fn 7 above, p 451). The GSP was developed at the instigation of UNCTAD. The underlying problem (as then believed) was that developed country demand for developing country commodities was less than developing country demand for developed country industrial goods. This meant that developing countries simply had little to offer in trade negotiations, and they were consequently unable to win substantial concessions from developed countries ('Prebisch Report', *Towards a New Trade Policy for Development: Report by the Secretary General of the Conference on Trade and Development* (1964)), p 18; also see Bartels, L, 'The Trade and Development Policy of the European Union', (2007) 18 *EJIL* 4, p 730.

development⁹² started its evolution even before the primarily trade liberalisation objective of international trade were to be neutralised by the post-GATT concept of international trade in which development aims play a major role.⁹³ From a legal perspective, the use of an instrument of the CCP or trade to promote development objectives was affirmed by the ECJ in *Opinion I/78* and the *GSP* case. This legalised the EU's embrace of the economic theory that 'policies toward foreign trade are among the more important factors promoting economic growth and convergence in developing countries',⁹⁴ alongside the theory that 'integration into the world economy is the best way for countries to grow.'⁹⁵ As will be remembered from the previous Chapter, the latter become an aspect of the objectives of EU development policy at Maastricht, and of the Cotonou Agreement which regulates EU trade and development cooperation with SSA. However, this does not mean that development policy is itself entwined with trade policy.⁹⁶ Indeed, to insinuate such,⁹⁷ would be tantamount to asserting that the subjection of the CCP to a general framework of EU external relations traversing non-economic EU external action objectives and principles⁹⁸ implies interweave of the different fields of EU external policy beyond distinction. In fact, to accept such an insinuation would be to accept the redundancy of the requirement of policy coherence. But, it is clear that none of these two

92Unless it is a case of 'doing' PCD without even knowing it as espoused in Krätke, F, 'Policy coherence: a sensible idea lost in translation?', Monday 11 November 2013, last modified on Monday, 24 November 2014, available at <http://www.theguardian.com/global-development-professionals-network/2013/nov/11/policy-coherence-global-development-zero-sum-game>, accessed 24 October, 2015.

93As devised under the auspices of UNCTAD (see fn 42 above). This is the background to the WTO global trade rounds (see fn 46 above). Since then, the WTO helps to shape and maintain a system of global trade rules that not only keeps the global economy open for trade, but also reflects and respects the special needs and concerns of developing countries.

94IMF, World Economic Outlook, Washington, DC, May 1997, p 84; also see Krueger, A, 'Why Trade Liberalisation is Good for Growth,' *The Economic Journal*, 108, September 1998, 1513-1522, p 1513.

95Fischer, S, 'Lunch Address Given at the Conference on 'Promoting Dialogue: Global Challenges and Global Institutions', American University, Washington, DC, April 13, 2000.

96MacLeod, *et al*, *The External Relations of the European Union Communities* (Oxford: Clarendon Place, 1996), p 272. As submitted above, development policy and trade policy are *de jure* and *de facto* distinct from each other even if they may interact in practice where developing countries are involved.

97Even apart from the analysis in the previous Chapter.

98Under Article 21 TEU.

scenarios is the case. With specific regards to the first, as mentioned earlier, the EU trade policy is at all times marked by specificity. Nevertheless, it could legally expand in its interaction with other EU policies due to its open-ended and evolutionary nature as the ECJ pronounced in *Opinion 1/94*.⁹⁹ While this pronouncement may have been made with reference to scope, the relationship between scope and objectives of a policy means that this open-ended and evolutionary nature extend to the objectives of trade policy. Significantly, the expansion of trade objectives into development policy in the interaction between trade policy and development policy does not equate to policy coherence for development. In fact, it is worthy of note that trade liberalisation could run contrary to the objectives of development policy and could potentially hamper development.¹⁰⁰ However, while this would *prima facie* equate to incoherence, in reality, a lot would depend on what the EU is willing to concede in the context of its asymmetrical economic and trade relations¹⁰¹ with its developing partner countries including those of SSA. In this regard, it is noteworthy that there is apparently an evolving general detour from the traditional practice of using trade agreements mainly for development and security objectives to strictly economic objectives.¹⁰² This is best illustrated by a recent Commission Communication.¹⁰³ This makes it clear that EU external trade policy should be (or is) primarily geared towards the EU's economic objectives.¹⁰⁴ Whether (or to what extent) this

99See for example *Opinion 1/94*, fn 64 above, para 41; also see Jacobs, F, 'The completion of the internal market v the incomplete common commercial policy' in Konstadinidis, S (ed.) *The Legal Regulation of the European Community's External Relations after the completion of the internal market* (Aldershot: Dartmouth, 1996), p 3.

100See Chapter Two of this thesis at 2.4.2. above (especially fn 206) on the tension between development policy objectives and the objective of integration into the world economy which is primarily a trade objective with trade liberalisation at its core; also see Stiglitz, J, and Charlton, A, *Fair Trade for All: How Trade Can Promote Development* (OUP, 2005), p 15.

101See for example Case 104/81 *Hauptzollamt Mainz v C. A. Kuferberg & Cie KG C. A.* (1982) ECR 3641; and Case C 149/96 *Portuguese Republic v Council* [1999] ECR I-8395).

102Heron, T, and Siles-Bruñe, G, 'Competitive liberalisation and the 'global Europe' services and investment agenda' (2012) 50 *Journal of Common Market Studies* 2, 250–266; and De Ville, F, and Orbie, J, 'The European commission's neoliberal trade discourse since the crisis: legitimizing continuity through subtle discursive change' (2014) 16 *British Journal of Politics and International Relations* 1, 149–167.

103See 2020 Strategy, fn 1 above; also Global Europe, fn 87 above.

104It offers the reasons that the EU is engaging in the contemporary FTAs namely domestic economic policy considerations, the ineffectiveness of existing trade agreements to meet the EU's economic objectives, the

stance applies to EU trade policy towards SSA is not clear and may not yet be determined with certainty in the light of the mainly inconclusive relevant EPAs and the confusion surrounding them.¹⁰⁵ At all times, a difficult but integral aspect of the discourse on coherence in the interaction between trade and development objectives in the context of EU relations with SSA is the place of development finance in this interaction.¹⁰⁶ As discussed below, this is an unresolved question. For even though, the EU runs a trade-driven poverty approach in this context, it appears that the trade benefits are lacking as it relates to poverty alleviation while the latter which is a metonym of development appears to be located in the financial aid instruments. Illustrative are the instruments of EU trade policy towards the region.

4.3. The Instruments of EU external Trade Policy with special reference to SSA – a pertinent overview

As a distinct policy, the EU trade policy has its own unique instruments even though they could contribute to, or sometimes double as development instruments as discussed above. In this regard, this section does not attempt to cover all the instruments of EU trade policy. Indeed, such unlimited coverage is not only unnecessary but also impossible within the limited confines

unsuccessful completion of the Doha Development Round, and the trade policy of the EU's main competitors (Ibid; also see Cremona, fn 86 above, p 246).

¹⁰⁵If the *Global Europe*, fn 87 (p 10-12) is anything to go by, the EPAs can go either way. Indeed while the CARIFORM EPAs appears to be strict trade agreements by virtue of their legal basis, the EPAs negotiated in the context of EU external action towards SSA has a development dimension (see 4.3.1. above). In so far as trade relates to development, differentiation is also an aspect of EU trade policy (see for example, Woolcock, S, 'Differentiation within reciprocity: the EU approach to preferential trade agreements.' (2014) 20 *Contemporary Politics* 1, 36–48; and also Ahnlid, A, and Elgström, O, Challenging the European Union: the rising powers and the United States in the Doha Round' (2014) 20 *Contemporary Politics* 1, 77–89) who also discuss how the EU maintains differentiation in trade negotiations so that commercial competition and sector interests are relatively more important in FTAs with emerging markets and high-income developing countries, whereas norms and institutional factors are relatively more important in shaping those with least-developed or low-income developing countries. For the status of the EPAs negotiated under the Cotonou Agreement, see European Commission, Overview of EPA Negotiations, updated September, 2015, available at http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf, accessed 21 October, 2015 (hereinafter Overview of EPAs).

¹⁰⁶See 4.3.1. below.

of this thesis.¹⁰⁷ In particular, this section does not cover instruments relating to anti-dumping,¹⁰⁸ anti-subsidy¹⁰⁹ and trade barriers.¹¹⁰ In contrast, the section discusses the instruments that are considered pertinent for the analysis of the coherence of EU external relations law and policies towards SSA, especially in the light of policy coherence for development. As mentioned above, at the heart of the customs union is a common external customs tariff. The CCT provides for common customs duties on imports.¹¹¹ However, these are not without exemptions or derogations as they EU may deem fit within the confines of international trade law. The derogations as they apply to the EU partners in SSA are at the heart of the key instruments of EU trade policy towards SSA which are pertinent to the investigation of coherence in EU external action towards the region. These can be categorised into autonomous preferential arrangements and conventional preferential trade agreements. Both type of arrangements are relevant to the coherence discourse in the context of this study. This

107See for example Eeckhout, fn 7 above, p 447-448 where he explains that even a book Chapter cannot possibly accommodate an unlimited coverage of the instruments of EU external trade policy.

108See Council Regulation 265/2009 on common rules for imports from countries not members of the European Community [2009] *OJ* L343/51.

109See Council Regulation 597/2009 on protection against subsidized imports from countries not members of the European Community [2009] *OJ* L188/93; for further analysis see for example Adamantopoulos, K, Pereyra-Friedrichsen, M, J, *EU Anti-Subsidy Law and Practice* (Bembridge: Palladian Law Publishing, 2001).

110See for example Council Regulation 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the WTO [1994] *OJ* L349/71; and Council Regulation 2641/84 on the strengthening of the commercial policy with regard in particular to protection against illicit commercial practices [1984] *OJ* L252/1; also see Bronckers, M, and McNelis, N, 'The EU Trade Barriers Regulation Comes of Age' in Bogdandy *et al*, (eds.) *European Integration and International Co-ordination-Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague: Kluwer Law International, 2002), p 55. Indeed, Instruments signed in the context of the WTO is already automatically outside the scope of this thesis in so far as EU-WTO relations is outside the scope of this thesis. Other legal instruments not covered here include the general import regulation (see Council Regulation 260/2009 on the common rules for imports [2009] *OJ* L84/1); and the general export regulation (Council Regulation 1061/2009 establishing common rules for export [2009] *OJ* L291/1). The basic principle of these instruments (albeit subject to some exceptions) are freedom of importation and freedom of exportation respectively.

111The current version of the CCT and the prevailing rates of duty is enshrined in Council Regulation on the tariff and statistical nomenclature and on the Common Customs Tariff (Council Regulation 2658/87 [1987] *OJ* L256/1). This consists of autonomous and conventional rates of duty. (Eeckhout fn 7 above, p 449). In sum, the autonomous rates are the original rates set in 1968 which may contemporarily be hardly applicable, as it may have in practice taken a back seat in the light of the conventional rates negotiated in the multilateral trade rules. One of these is the conventional rates negotiated in the GATT. These 'bound' duties negotiated in the GATT are applied to all imports, including those from non-WTO members (Volker, E, L, M, *Barriers to External and Internal Community Trade* (Kluwer, 1993), p 51.

is because they would both potentially apply to the country of case study namely Mali, and perhaps even also to SSA in general.¹¹²

4.3.1. The EPAs and the successive association agreements signed in the context of EU external relations with SSA: between trade and development

As discussed above,¹¹³ the successive association agreements signed in the context of EU external relations with SSA are not only categorised as trade and development cooperation agreements, but could actually be justifiably labelled either trade instruments or development instruments.¹¹⁴ Having said that, the fact remains that they primarily embody trade rules while providing a framework for the subsequent definition of development strategies as discussed in Chapter Three. Evidently, this would apply to all the agreements beginning from Yaoundé I and II¹¹⁵ to the Lomé regimes of association,¹¹⁶ and all through to the Cotonou Agreement.¹¹⁷ However, on the whole, these pre-EPA agreements shifted from an originally reciprocal trade agreement under the Yaoundé regimes to the non-reciprocal special trade preference of the Lomé regimes.¹¹⁸ The latter which were superimposed on the Cotonou Agreement were not

112Although the negotiations for the EU-West Africa EPA were closed in February 2014, and the text of the agreement was subsequently initialled and endorsed by the relevant parties, the signature process remains ongoing with a country like Nigeria still hesitant to sign the agreement (see Overview of EPAs, fn 105 above). Indeed, this EPA is still being queried with some calling for the region as a whole to be granted the Everything But Arms (EBA) regime which the EU offers to Least Developed Countries (LDCs) including Mali (see 4.3.3.2. below).

113See 4.1.; and 4.2.; and also Chapter Three of this thesis at 3.3.

114The latter can be deduced mainly from case law (see for example, Case C-268/94 *Portugal v Council* [1996] ECR I-6177; and a case like Case 45/86 *Commission v Council (GSP)* [1987] ECR 1493; and *Opinion 1/78 (Re the draft Agreement on Natural Rubber)* [1979] ECR 2871); and also Case C-316/91 *European Parliament v Council (EDF)* [1994] ECR 625.

115Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed at Yaoundé on 20 July 1963 (Yaoundé I) [1964] *OJ* L93/1430; Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed on 29 July 1969 (Yaoundé II) [1970] *OJ* L282.

116Lomé I Convention [1976] *OJ* L25/1; Lomé II Convention [1980] *OJ* L347/1; Lomé III Convention [1986] *OJ* L86/3; and Lomé IV Convention [1989] *OJ* L229/1 (amended [1998] *OJ* L156/3).

117The Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part (hereinafter the Cotonou Agreement) (2000) *OJ* L317/3 (First Revision (2005) *OJ* L287/1; Second Revision (2010) *OJ* L287/3).

118In general, 'special relations' are understood negatively as being the opposite of reciprocity (Holdgaard, R, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (The Hague: Kluwer

compliant with WTO rules¹¹⁹ because they were discriminatory preferences, and did not fall under any of the derogations to the MFN principle as discussed above.¹²⁰ From an EU law perspective, it is noteworthy that the ECJ established a difference between association which is based on (or expresses) the Community's 'generosity' and contains an imbalance or asymmetry in substantive obligations on the one hand, and association based on formal reciprocity (or reciprocity in implementation of obligations) which is the result of rational pursuance of self-interest between the contracting parties on the other hand.¹²¹ However, it is noteworthy that whether the agreements emerge as non-reciprocal as was the Lomé regimes of association, or reciprocal as was the case with the Yaoundé regimes of association and the EPAs as contemporarily negotiated, they are in different degrees framed with development concerns and objectives in mind as expressed in the relevant provisions of the instruments. Perhaps this could be regarded as a case of doing policy coherence for development without knowing.¹²² But it does not relate to policy coherence for development as contemporarily expressed and required.¹²³

By and large, whether an agreement emerges as normatively reciprocal or non-reciprocal in the context of EU external relations with SSA is not an undeniable reflection of the interaction

Law International, 2008), p 302).

119See fn 7 above.

120It is the legal and the international political pressure stemming from this that primarily led to the quest by the EU and its trade partners to create a WTO compliant agreement vis-a-vis reciprocal EPAs pursuant to Article 36(1) of the Cotonou Agreement.

121See for example Case 104/81 *Hauptzollant* fn 101 above; and Case C 149/96 *Portuguese Republic v Council*, fn 101 above). As discussed above, the present and future of EU external relations with SSA may no longer be organised under the framework of association but this does not change this principle espoused by the ECJ.

122Kratke, F, 'Policy coherence: a sensible idea lost in translation', The Guardian, Monday 11 November 2013, available at <http://www.theguardian.com/global-development-professionals-network/2013/nov/11/policy-coherence-global-development-zero-sum-game>, accessed 12 September 2015.

123The evolution of the latter on the back of the original focus of the coherence between the non-CFSP and CFSP external action was discussed earlier.

between the trade norms and development objectives in practice. For what matters and is usually lacking is the existence of a veritable favourable concession granted by the EU or extracted by its partners.¹²⁴ For example, the reciprocity of the Yaoundé trade regimes, did not involve products that were competitive in their respective markets.¹²⁵ In this regard, Bartels suggests that the principle of reciprocity in this context was only 'ideological' and 'theological', and essentially hard to identify in practice.¹²⁶ However, from another perspective, it can be argued that what obtains in this context could be the application of the principle of reciprocal rights and obligations in its global nature and relative to the balance of advantages.¹²⁷ For example, it can be argued that the EDF could be considered a major, if not the main instrument of EU's reciprocity for its trade interests in SSA. Of course, this is not a claim that the EU and its SSA (or ACP) partners considered (or consider¹²⁸) the EDF an instrument of reciprocity and generally often tacitly agree accordingly. Nevertheless, it is noteworthy that the sanctions applied in the face of breach of political conditionality by the countries of SSA under Article 96 of the Cotonou Agreement are usually measures involving the suspension of financial aid and not any trade benefits.¹²⁹ A pertinent illustration of this can be seen in the recent suspension of financial aid to the country of this case study namely Mali.¹³⁰ Furthermore, and with specific

124Ibid.

125See Bartels, L, 'The Trade and Development Policy of the European Union', in Cremona, M, (ed.), *Developments in EU External Relations Law* (OUP, 2008), p 137.

126Ibid.

127Okigbo, fn 21 above, p 120-121; also see Case C-87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze (Bresciani)* [1976] ECR 0129, para 22; Macleod, fn 96 above, p 309; Agwu, F, 'Reciprocity and its implications in international relations' in Eze, O, (ed.) *Reciprocity in International Relations* (Lagos: NIHA, 2010), p 31; Barker, J, *International law and international relations: International Relations for the 21st Century* (London: Continuum, 2000), p xv.

128The EDF remains a major instrument of EU external action towards even if the relationship between this and the new PAPED is not clear (see fn 69 above).

129Bartels, fn 125 above, p 153 (the Cotonou Agreement is only cited here for illustrative purposes. In contrast to the Yaoundé trade regime, the Cotonou Agreement is a non-reciprocal trade regime). In general, trade sanction is outside the scope of this thesis, mainly because coherence has been researched with regards to EU trade sanctions (see for example, Portela, C, and Orbie, J, 'Sanctions under the EU Generalised System of Preferences and foreign policy: coherence by accident?' (2014) 20 *Contemporary Politics* 1, 63–76).

130See 3.5. below.

regards to the Yaoundé era, Garrity¹³¹ posits that the EDF is the reason SSA countries were often lukewarm in their support of proposals aimed at the reform of the international trade system.¹³² Reference could also be made to the Nigeria-EC Agreement of 1965.¹³³ In the course of negotiating this agreement, Nigeria did not accept the EDF limb as granted to the original associates.¹³⁴ And, in what appears to be more than a mere coincidence, Nigeria secured more advantageous trading arrangements with the EU without endangering her own commercial interests.¹³⁵ According to Okigbo, “[t]he dissociation of the trade needs of Nigeria in relation to Europe from her development needs provided an unequivocal answer to those who had condemned the concept of association as inseparable from the politics of aid.”¹³⁶ Significantly, Nigeria is yet to ratify the EU-EPA West Africa which also has the PAPED financial aid as its development dimension.¹³⁷ However, whether these financial aid dimension¹³⁸ can rightly be considered the development dimension of EU trade policy so that the latter is at all times deemed coherent with the objectives of development policy is doubtful.¹³⁹ As Khaliq rightly

131See Garrity, M, ‘Africa and the European Economic Community’, (1971) 2 *RBPE* 1. It is noteworthy that this is not peculiar to EU external relations with SSA. For example it has been explained that when African governments were faced with either challenging the U.S. Position in cotton through the WTO dispute settlement mechanism and negotiating directly, they chose the latter for fear of retaliation by the U.S. through cuts in foreign aid to their countries (see Bergamaschi, I, ‘Mali: Patterns and limits of Donor-driven Ownership’, Oxford Global Economic Governance, *Working Paper* 2008/41), p 27.

132Ibid., p 103. Indeed, there was never any recourse to the legal mechanism for dispute resolution under the Yaoundé Convention in search of a solution to the unfavourable aspects of EU trade policy. Whether the flexibility of the legal obligations (see Chapter Two of this thesis) had something to do with this is not clear.

133The Nigerian Agreement never entered into force, and was also not published in the Official Journal (Peers, fn 16 above, at fn 7).

134See Okigbo, fn 21 above, p 132.

135Ibid.

136Ibid.

137See fns 68 and 69 above.

138Indeed, it can be argued that the need for change in the context of EU trade relations with SSA was more of an implicit acknowledgement of the failure of this particular example of development through trade than of the pressure to conform to the WTO rules.

139However, see Concorde, ‘The EPA between EU and West Africa: who benefits?’, Spotlight Report 2015 Policy Paper, p 4, available at http://www.concordeurope.org/images/Spotlight_2015-TRADE-EPA-April_2015-EN.pdf, accessed 25 September 2015, where a lack of commitment on the part of the Union regarding financial aid is counted as a contributory factor for the conclusion of incoherence; also see here it is described as a piece in the puzzle of a development vision (Dalleau, M, and Seters, J, Operationalising the EU-West Africa Development Programme: moving beyond the paper work’, (2011) ECDPM *Discussion Paper* No. 121, p 4.

points out, trade is widely regarded as the most powerful instrument available to alleviate poverty.¹⁴⁰ Obviously the EU is acquainted with this as its historical trade-driven poverty alleviation approach illustrates. Nevertheless its old approach which has avowedly failed, is the one in which trade is entwined with development aid policy without any significant trade benefit to the EU's partners in SSA. In 2005, the EU Trade Commissioner in his report to the EP submitted that “the old-style preference regimes between Europe and developing countries have not provided a pathway out of poverty”.¹⁴¹ Arguably, the EU on the back of this acknowledged the need to separate development finance from trade. For, in 2006 the EU announced that it is moving its trade relations with the ACP group to comply with WTO rules on reciprocity in the context of the EPAs because it believes that “What matters to the ACP countries is real trade [...] that provides secure jobs and lifts people out of poverty”.¹⁴² This sounds like a recognition and renunciation of the traditional link between trade and financial aid in this context. Of course, whether this is mutual is another matter. As discussed above in relation to the legal basis for the EPAs, the financial aid dimension is once again tied to the EPAs with SSA as apparently instigated by the SSA partners of the EU. In any event, the prospects of 'real trade' or a strict adherence to 'trade for trade' will depend on what the region can bring to the table, and whether they are able to identify the current needs of the EU, including for example, energy.¹⁴³ In

140Khalik, fn 38 above, p 130 (citing Bhagwati, J, In Defence of Globalisation (OUP, 20015) p 55). Indeed, this is so much so that a right to trade is being proposed (see for example Stiglitz, J, and Charlton, A, *The Right to Trade: Rethinking the Aid for Trade Agenda* (London: Commonwealth Secretariat, 2013).

141Mandelson, P, 'Remarks to the Trade Committee of the European Parliament', May 2005 cited in Sicurelli, D, *The European Union's Africa Policies* (Farnham: Ashgate, 2010), p 84. This does not mean however that there were no benefits at all accruing to the ACP group under the Lomé trade regimes (see Bartels fn 125 above, p 150-151 for some of the substantial value of the Cotonou preferences for the ACP).

142Cited in Sicurelli, fn 141 above, p 84; indeed a right to trade is being proposed (see for example Stiglitz and Charlton, fn 99 above).

143As Abass notes (albeit in relation to security), there is little the EU can do if its African partners are not willing or able to take greater responsibility (Abass, A, 'EU Crisis Management in Africa: Progress, Problems and Prospects' in Blockmans, S, (ed.), *The European Union and Crisis Management: Policy and Legal Aspects* (The Hague: TMC Asser, 2008), p 342). SSA boasts of two oil giants namely Nigeria and Angola, and some other smaller producers such as Gabon, Chad, Equatorial Guinea, Sudan and Somalia. According to the 2012 World Economic Report of the IMF, Nigeria's rising oil output will probably expand 7.1 percent this year, compared with 7.2 percent in 2011, while Angolan growth is set to accelerate to 9.7 percent from 3.4 percent.

general, this might not be as simple as it sounds in practice seeing as trade negotiations bring into play different dynamics. For example, an identified EU need might not be generally demographic to the region as a whole, and it has to be appreciated that what favours one country might not necessarily favour other countries in the same region. Illustrative is the special situation of LDCs including Mali as discussed below, and in general, the complexity surrounding the negotiation of the EPAs in the context of EU trade relations with SSA.¹⁴⁴

Having said that, it is doubtful whether the failure of trade arrangements or preferences should automatically lead to a conclusion of incoherence. This would especially be the case when the incapacity of the recipient developing countries to respond to opening of the EU market along with other exogenous determinants that could affect their international trade¹⁴⁵ are taken into account. However, whether this last statement completely absolves the EU of any charges of incoherence in relation to the impact of its trade policy on development objectives is another matter.¹⁴⁶ Indeed, as discussed below with specific regards to Mali as a case study, although the benefit of any level of access to EU market at all times depends on the recipients' capacity to respond to the further opening of the European markets and on if there is a demand for products for which they can meet the supply,¹⁴⁷ there is no doubt that the EU can do more by way of concessions even within the confines of the rules of the WTO. Without denying a lack of a

144Furthermore, in the context of EU-West Africa EPA, Nigeria is hesitating to sign the agreement because of what it portends specifically for this country according to national economic assessment; also see the next page for other reasons that may make jeopardise the negotiation position of the EU's developing country partners.

145Rodrik and Rodriguez, fn 49 above, p 4.

146Charges of incoherence abound (see for example Berthelot, fn 55 above; and Concorde, fn 138 above). However, it appears the EU does not share this view. For example, the EU most recently launched a new study that details how EU trade policy has had a positive impact in terms of policy coherence for development (see Assessment of economic benefits generated by the EU trade regimes towards the developing countries, Brussels, Belgium, 6 JULY 2015, available at <http://erd-report.com/events/trade-report-launch-event/>, accessed 04 July 2015).

147Khaliq, fn 38 above, p 134.

comprehensive vision of how to link trade and development,¹⁴⁸ it has to be conceded that there are a couple of things the Union can do to make its trade policy towards SSA more 'development-friendly', and hence more coherent, over and above acknowledging policy coherence for development in the relevant trade instruments. From this perspective, WTO compatibility can be crossed out from the list of challenges facing EU external trade policy as it relates to the requirement of policy coherence for development. Indeed, without denying that concession and coherence are at all times questions of extent, it must be admitted that the key challenge to the coherence of EU trade policy with development objectives is the economic needs and interests of the EU and its Member States. Illustrative is not only the procedure for trade policy-making,¹⁴⁹ but also the pertinent contemporary EPAs as discussed below with a specific focus on Mali as a case study.¹⁵⁰ Significantly due to Mali's LDC status,¹⁵¹ it could potentially choose between the EPA on the one hand, and the EBA under the unilateral EU GSP as it applies to LDCs on the other hand.¹⁵² Hence the relevance of the latter in the context of this thesis as will now be discussed.

4.3.2. General System of Preferences (GSP) – the autonomous instrument of EU trade and development policy towards SSA

The GSP is an autonomous measure albeit legally based on GATT.¹⁵³ As mentioned earlier,¹⁵⁴ they are preferences granted without reciprocity, and instigated by the acknowledgment of the

148Holden, P, 'Tensions in the discourse and practice of the European Union's Aid for Trade' (2014) 20 *Contemporary Politics* 1, 90–102; also see Von Moltke, K, 'Implications of the Cotonou Agreement for Sustainable development in the ACP countries and beyond' (Canada: IISD, 2004), p 22-23, where he explains that although there is a near universal recognition of the significance of the intersection between trade, development and the environment, as often expressed with the notion of 'sustainable development', turning this recognition into practical policy prescriptions remain elusive.

149See 4.4. below.

150See 4.5. below.

151See Chapter One of this thesis at 1.0. above, especially fn 54.

152See 4.5. below.

153Decision of 25 June 1971 L/3545, BISD 18 Supp. (1972) 24 (cited in Eeckhout, fn 7 above, p 451).

154At fn 91 above.

unequal bargaining power between developed and developing countries.¹⁵⁵ The EU's system of GSP was first established in 1971,¹⁵⁶ but the scheme presently in operation is found in Regulation 978/2012.¹⁵⁷

The GSP is a trade policy instrument adopted in the framework of the CCP,¹⁵⁸ and consists of the full or partial reduction or suspension of the customs duties set out in the CCT.¹⁵⁹ Its key aim is to support developing countries' exports to the EU and so facilitate their integration into international markets. But it is also aimed at assisting developing countries in their efforts to reduce poverty and promote good governance and sustainable development by helping them to generate additional revenue through international trade which can then be reinvested for the benefit of their own development and, in addition, to diversify their economies.¹⁶⁰ In general, the GSP is arguably the clearest illustration of the use of instruments of trade policy to promote development policy objectives in the field of EU external relations law and policies.¹⁶¹ In fact, it has been described as a trade instrument that began its life as the poor relation of EU development policy.¹⁶²

The scheme's tariff preferences covers three separate regimes consisting of a general regime

¹⁵⁵Ibid.

¹⁵⁶Eeckhout, fn 7 above, p 451.

¹⁵⁷Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] *OJ L303/1* (the repealed regulation is Council Regulation 732/2008 applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) 1933/2006 and Commission Regulations (EC) 1100/2006 and (EC) 964/2007 [2008] *OJ L211/1* (hereinafter GSP Regulation).

¹⁵⁸Ibid; also see Case 45/86 *Commission v Council (GSP)* [1987] ECR 1493.

¹⁵⁹Eeckhout, fn 7 above, p 451.

¹⁶⁰Regulation (EU) No 978/2012, Preamble paragraph 7.

¹⁶¹For example, as discussed above with specific regards to the association agreements signed in the context of EU external relations with SSA, the instruments are not clearly classified as trade or development instruments.

¹⁶²Stevens, C, 'The Proposed New GSP: Turning Away from Multilateralism' in *The Next Decade of EU Trade Policy: Confronting the Challenge* (London: ODI, 2012), p 22.

and two special arrangements.¹⁶³ The first regime is the standard arrangement ('GSP') granted to all those developing countries which share a common developing need and are in a similar stage of economic development.¹⁶⁴ It also takes account of the fact that the development, trade and financial needs are subject to change and ensures that the arrangement remains open if the situation of a country changes.¹⁶⁵ The second regime is the specific incentive arrangement ('GSP+') which offers additional trade incentives to developing countries already benefitting from GSP to implement core international conventions on human and labour rights, sustainable development and good governance.¹⁶⁶ It offers additional tariff reductions to those offered by the general GSP,¹⁶⁷ and hence gives improved access in comparison to the latter.¹⁶⁸ The third regime is the EBA initiative. The most generous of the three regimes, the EBA offers full duty free, quota free access for all products except arms and ammunition for 49 LDCs.¹⁶⁹ It is noteworthy that 43 of these LDCs are in SSA, and this includes Mali the country of case study in this thesis.¹⁷⁰ The EU considers the EBA to be its major contribution to poverty-alleviation through trade.¹⁷¹ However, whether this has worked in the context of EU external relations with

163Regulation (EU) No 978/2012, Preamble paragraph 8. This is in consonant with the EU's differentiated approach (see for example, Global Europe, fn 87 above; and Chapter Three of this thesis).

164The GSP provides for duty reductions on about 66% of products in EU customs tariff code or tariff lines (European Commission, Memo, 'Revised EU trade scheme to help developing countries applies on 1 January 2014, Brussels, 19 December 2013, p 2).

165Regulation (EU) No 978/2012, Article 1(2)(a), and Preamble paragraph 9. For example, if the products under GSP become competitive and do not need support to access the EU market, they can lose preferential treatment. This is known in EU trade policy jargon as "graduation" from the GSP

166Ibid., Article 1(2)(b); Preamble paragraph 11.

167European Commission, Memo, 'Revised EU trade scheme to help developing countries applies on 1 January 2014, Brussels, 19 December 2013, p 2.

168Furthermore, in contrast to the GSP, products under GSP+ cannot be graduated because the beneficiaries are vulnerable countries with a non-diversified base.

169Regulation (EU) No 978/2012, Article 1(2)(c), and Preamble Paragraph 16. This is on 99% of all tariff lines.

170See European Commission, 'Everything But Arms (EBA) – Who benefits?', 10 October, 2014, p 2, available at http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152839.pdf, accessed 21 September 2015.

171Khaliq, fn 38 above, p 133; also see Faber, G, and Orbie, J, 'Everything But Arms: Much More than Appears at First Sight' (2009) 47 *JCMS* 4, 767-787. Indeed, the recent report by the EU on the effect of its trade policy on development objectives (see fn 144 above) was mainly based on the GSP and the EBA. However, see in general, Freres, C, and Mold, A, 'European Union Trade Policy and the Poor: Towards Improving the Poverty Impact of the GSP in Latin America' in Hout, W, *EU Development Policy and Poverty Reduction: Enhancing Effectiveness* (Ashgate, 2007), p 33 – 46 where they explained that there is a failure to establish a link between GSP and poverty reduction.

SSA is contestable.¹⁷² In any event, in line with the provisions of the Treaties and the requirement of policy coherence for development, the GSP regulation recognises that the CCP is to be consistent with and is to consolidate the objectives of the Union policy in the field of development cooperation, laid down in Article 208 TFEU, in particular the eradication of poverty and the promotion of sustainable development and good governance in the developing countries.¹⁷³ Nevertheless, when it comes to assessing the coherence of trade policy with development objectives, these autonomous regimes are at the same place with the conventional instruments in so far as the relationship between trade and development is invariably unsettled, and in so far as acknowledging policy coherence for development in an instrument may not automatically translate to coherence of the norms with development objectives. Having said that, it should be noted that in so far as Mali is only torn between the EPAs and the EBA, it is these two which are pertinently discussed in relation to Mali as a case study below.¹⁷⁴ In this regard, it should further be noted that the complex interaction between the relevant EU institutions for trade and development is not a feature of the unilateral instrument (such as the GSP/EBA) as it is of the conventional trade instruments (such as the EPA). Nevertheless, both hold implications for coherence in so far as they equally illustrate the distinction between trade and development, and perhaps how the potential of achieving the coherence of trade policy with development objectives is affected by the interests of EU Member States in the course of trade policy making.

¹⁷²See Bartels, fn 125 above, p 158 where he explains that in 2006, over half of all EBA imports were accounted for by non-SSA LDCs; also see below.

¹⁷³Regulation (EU) No 978/2012, Preamble paragraph 4.

¹⁷⁴Of course, this does not mean that GSP may not be mentioned as is necessary.

4.4. The institutional dimension of EU trade policy with specific reference to SSA

This section analyses the roles of the institutions in the decision-making, implementation and enforcement of EU trade policy with a view to determining policy coherence for development in this Chapter, and subsequently, coherence between these and the other relevant policies investigated in this thesis. It draws from the general overview of EU institutional framework for coherence provided in Chapter Two of this thesis. In doing this, the slight difference between the institutional procedures for autonomous and conventional instruments of EU trade policy is highlighted in so far as both types of instruments are relevant to the coherence discourse especially in the context of this analysis. With regards to the former, as discussed above, the GSP which is relevant to the coherence discourse in the context of this research is an autonomous instrument. With regards to the latter, although the focus is primarily on trade policy-making which comes into play because of the EPAs, the dimension of the institutional procedure in the context of association agreements is also highlighted as indicated in Chapter Three.¹⁷⁵ Indeed, in so far as this analysis is with a view to determining coherence in the interaction between trade and development, it can be argued that the difference between the procedures for trade policy-making and association does not affect the result of the interaction between trade and development as the institutional dichotomy between the two policies within the Commission. The Lisbon changes are also highlighted especially the greater involvement of the EP and the lack of any involvement by the post-Lisbon bodies for coherence, namely HR/VP and the EEAS. At all times, the chances of opacity,¹⁷⁶ and the reality of the interaction

¹⁷⁵As discussed in the previous Chapter, the policy-making for trade policy would usually end at this stage with no further need for implementation in contrast to development aid (see 3.4.1. above). See the introduction to this Chapter for the reason why the dimension brought by the practice of association agreements to trade policy making is relevant despite the fact that the practice of association agreements may phase out as argued above.

¹⁷⁶See Lerch, fn 73 above for the view that even the formulation of the contemporary EU-West Africa EPA was opaque even if no less effective; also see Aggarwal and Forgaty, fn 58 above, p 30 for the view that it can be particularly difficult to define a coherent set of procedure and processes whereby broad EU trade policy is made. This does not detract from the fact that a recent WTO report applauds the EU's positive role in maintaining an

between the Union and the Member States in trade policy decision-making,¹⁷⁷ should be borne in mind. As discussed earlier, this involvement of the Member States in trade policy making despite the Union's exclusive competence in this field of policy is not surprising in light of the Union's *Staatenverbund* nature.¹⁷⁸

4.4.1. Decision-making for autonomous instruments

Article 207(2) TFEU simply provides that the EP and the Council, acting by means of regulations in accordance with the ordinary legislative procedure (OLP) shall adopt the measures defining the framework for implementing the CCP. Eeckhout notes that there is a distinction here between CCP regulations laying down general legislative provisions concerning trade policy, such as the GSP regulation discussed above, and implementing instruments laying down provisions for specific cases,¹⁷⁹ such as trade defence instruments and anti-dumping legislation. As mentioned earlier, the latter two instruments are outside the scope of this analysis. Hence, the institutional distinction between regulations laying down general legislative provisions concerning trade policy and the implementing instruments of trade policy is not explored further in this analysis.¹⁸⁰ Similarly, a description of the OLP is not necessary for the focus of this thesis.¹⁸¹ It suffices to state here that the OLP entails the Commission's

open and transparent global trading system (See WTO *Trade Policy Review*, 'The European Union', WT/TPR/S/317, 18 May, 2015).

¹⁷⁷See Frohlich, H, 'EU Trade Policy' in Waldenberger, F, (ed.), *The Political Economy of Trade Conflicts: the Management of Trade Relations in the US-EU-Japan Triad* (Heidelberg: Springer, 1994), p 20.

¹⁷⁸See Chapter Two of this thesis.

¹⁷⁹Eeckhout, fn 7 above, p 458.

¹⁸⁰It suffices to state that Article 291 TFEU provides that implementing powers shall be conferred on the Commission (or, in duly justified specific cases... on the Council' where uniform conditions for implementing legally binding Union acts are needed. For the rules governing implementing Acts see Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] *OJ L55*/13.

¹⁸¹Indeed, it is mainly relevant to internal policy making.

right of initiative for proposals, and the co-decision power of the Council and the EP both of which have to agree with and adopt the final instrument following a series of readings by these last two institution. This is a change from the pre-Lisbon situation where the Council simply acted on a proposal from the Commission without any involvement by the EP. However, while the involvement of the EP has come to be generally acknowledged as a positive development with regards to internal policies of the EU, it can be argued that this involvement could also aid coherence in EU external action. In particular, it could aid the coherence of EU trade policy with development objectives especially in the context of autonomous instruments. For as discussed in Chapter Two of this thesis,¹⁸² although the EP is not assigned any specific formal role with regards to coherence, the general responsibility on the institutions to ensure coherence under Article 13 TEU applies to it. In practice, apart from the work of its Development Committee, the EP most recently created a standing Rapporteur for PCD which is aimed at pointing out potential incoherencies in EU policies, and at ensuring that the effects of new European legislation on developing countries are taken into account during the lawmaking process.¹⁸³ At all times, the EP's co-decision power could make a difference to the coherence of trade policy with development objectives in so far as the existence of that power alone could elicit greater cooperation from the Council representing the EU Member States and their interests. As for the Councils' voting system as it relates to the assessment of policy coherence for development, this is discussed under the procedure for conventional instruments in so far as it is the same in autonomous instruments as in conventional instruments of EU external trade policy.

¹⁸²See Chapter Two of this thesis at 2.5.3.4.

¹⁸³*Ibid.*

4.4.2. Decision-making for conventional instruments of EU external trade policy including in the context of association agreements¹⁸⁴

As discussed in the previous Chapter, although trade and development are entwined under the successive association agreements signed in the context of EU external relations with SSA, a discussion of the institutional procedure at the stage of policy making in the context of association agreement is better carried out in this Chapter where trade is discussed. This is because it is mainly trade policy that is determined at this stage while only the general framework of what amount to development policy is defined at this stage. Otherwise, the analysis of the dimension brought by EU trade institutions in the procedure for association agreements, and the analysis of the institutional procedure for trade will better enable an assessment of the coherence of trade policy with development policy.

The Treaties provide for the regular treaty-making procedure in Article 218 TFEU. This bears the procedure for association agreements.¹⁸⁵ However, the process by which trade agreements are proposed (or initiated), negotiated and agreed differs slightly from this general Treaty-making procedure provided in Article 218 TFEU. By virtue of Article 207(3) TFEU, trade agreements are subject to some special procedural modifications. Woolcock categorises the process of trade agreements into three different steps or stages namely initiation, negotiation, and conclusion.¹⁸⁶ These stages apply to association agreements. In principle, this process involves three EU institutions namely, the Commission, the Council and the EP,¹⁸⁷ even though the latter only became involved in trade policy agreements by virtue of the Lisbon changes.¹⁸⁸

¹⁸⁴See Chapter Three of this thesis at 3.4.1.

¹⁸⁵With a specific reference made to it in Article 218(6)(a)(i) TFEU.

¹⁸⁶Woolcock, S, 'Trade Policy: A Further Shift towards Brussels' in Wallace, *et al.* (eds.) *Policy-Making in the European Union* (OUP, 2010) 381, at 387–93; also see in general 'Trade Negotiation Step by Step' fn 87 above.

¹⁸⁷Article 207(3) TFEU.

¹⁸⁸Article 218 (6)(a)(iv).

However, this is not to say that the institutional procedure for trade policy making especially in the context of association agreement is clear cut enough as to determine the involvement of the institutions with certainty.¹⁸⁹ This of course puts the assessment of institutional coherence in context.

4.4.2.1. The initiation of proposal for conventional trade instrument - the Commission's forte

Similar to the OLP, the proposal to launch a trade negotiation must come from the Commission pursuant to Article 207(3) TFEU. As discussed in Chapter Two of this thesis, the Commission is comprised of different DGs. For the purposes of trade policy, the relevant DG is DG Trade, which proposes the launch of negotiations for trade agreement with an external party. This includes the EPAs. In the pre-EPA era of EU external relations with SSA when association agreement was the practice, the proposals for the trade and development cooperation originated from DG Dev, which had a trade division.¹⁹⁰ Whether this meant the elevation of development objectives above EU trade objectives is difficult to say. For although there were more years of non-reciprocity than the years of reciprocity under that dispensation, there is no clear difference between them in terms of their impact on development.¹⁹¹ Under the current dispensation, the trade division of DG Dev has been transferred to DG Trade, and it is the latter that has the mandate for the EPA proposals.¹⁹² As mentioned in the previous Chapter, the decoupling of the two in 2000 entailed a separation of decision-making with the trade regime no longer considered an aspect of development aid. This was also followed by a corresponding reduction of the

¹⁸⁹See fn 176 above.

¹⁹⁰See Elgström, O. & Pilegaard, J, 'Imposed Coherence: Negotiating Economic Partnership Agreements' (2008) 30 *European Integration* 3, 363-380, at p 370; also see Sicurelli, fn 141 above, p 105; Hudson, A, 'Case Study: Economic Partnership Agreements', para 3, available at <http://www.odi.org.uk/resources/download/2798.pdf>, accessed 15 August, 2012); and House of Lords, EU Committee, fn 55 above, para 114.

¹⁹¹See the above analysis.

¹⁹²Ibid.

development focus of DG Trade. The House of Lords EU Committee reports that their separation renders the need for coherent policy-making in these two areas correspondingly greater.¹⁹³ And this, especially in light of policy coherence for development.¹⁹⁴ However, the subsequent greater concentration on trade objectives is not in doubt as the EPAs illustrate. This is the case even though DG Trade has to conduct inter-service consultations with other DGs in order to take their concerns and interests into account.¹⁹⁵ Indeed, beyond the inter-service consultations, the Commission is also expected to hold a public consultation on the content and options for any trade agreement and to conduct an assessment of the impact of any such deal on the EU and on the potential partner.¹⁹⁶ This is (or should ideally be) an aspect of the formation of the National Indicative Programs (NIP) discussed in Chapter Three of this thesis.¹⁹⁷ In this regard, it can be argued that the EU is usually already (or expected to be) aware of the impact of a trade policy course on the development objectives of a potential partner or beneficiary prior to a trade offer or agreement. Nevertheless, it can also be argued that the practice does not always align with the legal-institutional provisions. For example, the EU has been accused of failing to conduct an unbiased assessment of the impact of the EU-West Africa EPAs which it finances,¹⁹⁸ and also of failing to commission a current impact assessment to ensure that the EU-West Africa EPAs initialled in 2014 will support development objectives.¹⁹⁹ This flouts policy coherence for development which requires the clear articulation

¹⁹³House of Lords, EU Committee, fn 55 above, para 114.

¹⁹⁴*Ibid.*, para 118.

¹⁹⁵See 'Trade Negotiations Step by Step', fn 87 above, p 3.

¹⁹⁶*Ibid.*, In general, the Commission's proposals both with regards to internal and external actions are the result of an extensive consultation process, which may be conducted in various ways such as impact assessment, reports by experts, consultation of national experts, international organisations and/or non-governmental organisations, consultation via Green and White Papers, etc. (see Ordinary Legislative Procedure "Step by Step", available at http://ec.europa.eu/codecision/stepbystep/text/index_en.htm, accessed 15 April, 2015).

¹⁹⁷House of Lords, EU Committee, fn 55 above, Appendix 7; and *EU Mechanisms that promote policy coherence for development* Scoping Study, European Centre for Development Policy Management, Studies in European Development Co-operation Evaluation No 2, Maastricht, July 2005 (Amsterdam: Aksant Academic Publishers, 2006), p 43.

¹⁹⁸Berthelot, fn 55 above, p 1.

¹⁹⁹Concorde, fn 139 above, p 4.

of reasons for acting in a manner which could impact negatively on developing countries in order that counter-arguments may be advanced.²⁰⁰ As the House of Lords EU Committee affirms, the process requires transparency so that there is no second-guessing whether the assessment of the potential impact of trade on development was carried out or not. Invariably, a trade policy proposal requires approval at the political level from the College of Commissioners in order for DG Trade to recommend to the Council the opening of negotiations and request the Council's authorisation for negotiations.²⁰¹ It is noteworthy that this would be the case even in the pre-EPA context of association agreements in so far as it is actually the rules of trade that are negotiated while the framework of EU development aid policy is unilaterally laid alongside the former once agreed. However, while the relevant Council configuration that would be engaged in Trade policy making is the Trade Council,²⁰² it would be expected that the Development Council²⁰³ would also be involved where it were an association agreement. In the context of association agreements, an ACP Working Group of the Council which is responsible for development affairs in the ACP countries would also be involved. As discussed above, the EPA is a free trade agreement, and if the ACP Working Group is involved in the light of the development-orientation of the EPAs, it will have to be only in relation to the PAPED which is not a trade instrument.

4.4.2.2. From authorisation to negotiation – between the Commission, the Council and the EP

In any event, by virtue of Article 207(3) TFEU, the Council can accept or reject the proposal

²⁰⁰House of Lords, EU Committee, fn 55 above, para 123.

²⁰¹See Article 8 Commission Decision 2010/138, Amending its Rules of Procedure [2010] *OJ L55/60*.

²⁰²However, see Chapter Two of this thesis at 2.5.3.2. especially fn 280.

²⁰³*Ibid.*

by a qualified majority vote (QMV).²⁰⁴ This voting rule which also apply to the autonomous instruments of trade policy requires only that 55% of Member States (16 out of 28) vote in favour, and that the proposal is supported by Member States representing at least 65% of the total EU population.²⁰⁵ It can be suggested that the QMV neutralises the influence of the Member States and empowers the Commission's agenda-setting power for EU trade policy.²⁰⁶ However, this may not be of global effect in this context. For while this could be the case in relation to negotiating the different positions of EU Member States,²⁰⁷ it can be argued that it does not relate to the global outcome of the norms of external trade policy as they could impact on the coherence of trade with development objectives. Further arguably, were the Commission in the helm of affairs in agenda-setting for trade policy without the encumbrance of the interest of the Member States, the coherence of trade policy with development objectives would be easier to achieve. For example, at least two clear illustrations have been provided of where EU Trade Commissioners pronounced their commitment to trade policy coherence with development only to backtrack at the influence of Member States.²⁰⁸ Based on this, it can be argued that although the existence of inter-institutional co-operation on paper does not automatically alter the differing institutional cultures of the different Commission DGs,²⁰⁹

204QMV is the general voting procedure for every aspect of EU trade policy except when the decision relates specifically to the fields listed in Article 207 (4) TFEU (these are not relevant to the focus of this thesis).

205This took effect from 1 November 2014, and replaces the former QMV comprising the votes of the Member States weighted very roughly according to their respective population (see Qualified Majority, a new rule from 1 November 2014, available at <http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>, accessed 03 August 2015).

206See for example Hayes-Renshaw, F, *et al*, 'When and Why the EU Council of Ministers Votes Explicitly' (2006) 44 *JCMS* 161, 184–85; and in general Tsebelis, G, & Garrett, G, 'Agenda-Setting Power, Power Indices and Decision Making in the European Union', (1996) 16 *International Rev. L. Econ.* 345. Nonetheless, it is noteworthy that regardless of the voting procedure prescribed in the Treaties, Member States in general strive to decide by consensus, and try to avoid voting in the Council as much as possible (see De Baere, G, *Constitutional Principles of EU External Relations* (OUP 2008), p 81).

207As Frohlich (fn 177 above, p 20) explains, the various Member States of course do not have identical trade policy objectives; also see in general, Da Conceição-Heldt, E, 'Variation in EU Member States' Preferences and the Commission's Discretion in the Doha Round', 1(2011) 8 *Journal of European Public Policy* 403 and also Nugent, N, *The Government and Politics of the European Union* (Houndsmills: Palgrave, 2006), p 376).

208Khaliq, fn 38 above, p 132.

209Mackie, J, cited in House of Lords, EU Committee, fn 55 above.

effective negotiation leading to a more favourable stance on trade policy coherence with development objectives could easily be achieved between these institutions. Indeed as Mackie posits, it is only a rigid adherence to institutional culture that will lead more and more to "disjunction rather than collaboration".²¹⁰ And it appears that such rigid adherence is not necessarily systemic to the Commission. For example, DG Dev was successful in pushing for a change in the proposal of DG Agriculture during the reform of the EU Sugar regime in 2005.²¹¹ Assisted by the Council's decision on policy coherence for development, DG Dev had refused to accept the original proposal of DG Agriculture and it was modified to make it more compatible with development purposes.²¹² Of course, such an effective coordination might depend on the intensity of inter-institutional relations. But at least it is possible. The position of DG Dev regarding the EU-West Africa EPA was not established in the course of this study. However, it appears that its role is in general minimal and mainly confined to issues regarding funding support to the EPA *vis-a-vis* the EDF.²¹³ At all times, the power to accept or reject a proposal rests with the Council which is not only the representative of EU Member States but also assures that the interests of the Member States are protected.²¹⁴

Following the Council's authorisation, the Commission would launch the negotiation and also negotiate on behalf of the Union pursuant to Article 207(3) TFEU. Clearly this would be DG Trade. And this would be the case at all times in so far as it is the rules of trade that is negotiated whether in the context of the EPAs or the pre-EPA association agreements. For even in the

²¹⁰Ibid.

²¹¹House of Lords, EU Committee, fn 55 above, para, 122.

²¹²This is only used as an analogy here in so far as the Common Agricultural Policy is outside the scope of this study (see fn 55 above).

²¹³Khaliq, fn 138 above, p 137. As will be remembered from footnote 69 above, the relationship between the EDF and PAPED is not clear.

²¹⁴See Chapter Two of this thesis at 2.5.3.2.

context of the latter when DG Dev only harboured DG Trade, the technicality of trade would mean that only trade experts would be involved in the negotiation.²¹⁵ However, this is not to say that DG Dev would be completely excluded in that context. Indeed, it appears that its involvement in that context was well used to enhance the coherence of trade policy with development objectives, and was more representative of an all-EU approach with the attendant inspiration of confidence on the other party. Indeed, Hudson highlights a particular confusion that arose in the course of the negotiation of the EU-West Africa EPA. At the heart of this confusion is that West Africa had assumed that the EU's negotiator was speaking on behalf of the whole Commission (on behalf of the EU), only to become shattered when they discovered that DG Trade is unable to deal with development issues.²¹⁶ Indeed, Stevens explains that trade negotiations are conducted by trade officials not trade economists with the implications that the negotiations are treated as a mercantilist exchange of 'concessions' in line with the perspective of the former.²¹⁷

At all times, the Commission must conduct the negotiation within the framework of such directives as the Council may issue to it, and in consultation with the Council's special Trade Policy Committee (Article 133 Committee).²¹⁸ This Committee protects the interests of the

215Invariably, although it is in principle possible to hold a mixed negotiation divide between the EU and Member States' part, with different negotiators for each part in the context of mixed agreement as is traditionally the case in the context of EU relations with SSA, the practice indicates that most mixed agreements are negotiated as non-mixed agreements (with the Commission in charge), albeit with a greater role for Member States' representatives (Koutrakos, P, *EU International Relations Law*, (Oxford: Hart, 2006), p 216). Forwood argues that for third countries, including those of SSA, the complication is that the real negotiation is the intra-Union one between the EU and the Member States, so that once an intra-Union common position is reached, the Union and Member States adopt, a 'take it or leave it' approach (see Forwood, G, 'The Road to Cotonou: Negotiating a Successor to Lomé' (2001), 93 *JCMS*, 3, pp. 423 – 442).

216Hudson, fn 190 above.

217Stevens, C, 'Economic Partnership Agreements: the end of the Beginning' in *The Next Decade of EU Trade Policy: Confronting the Challenge* (London: ODI, 2012), p 26.

218This categorisation was based on the pre-Lisbon Article which provides for this special Committee. Post-Lisbon, it would be more appropriate to refer to this Committee as Article 207 Committee seeing as the provision is now in Article 207(3) TFEU subparagraph 3.

Member States in the trade negotiation process²¹⁹ once again illustrating the *Staatverbund* character of the Union. In fact, to ensure that it keeps to its original mandate, the Commission must also report regularly to this Committee²²⁰ on the progress of the negotiation.²²¹ Although the Commission must also report to the EP on the heels of the Lisbon changes, the EP's influence at this stage might be only nominal even though it feels strongly for development.²²² The relevant EP Committee for trade is the International Trade Committee (INTA), even though the Development Committee can give its opinion.²²³ In general, the EP's only real power with regard to enhancing policy coherence for development in the context of conventional instruments might rest only in its role in the last stage of policy-making namely the conclusion of agreement.

4.4.2.3. Concluding negotiation – between the Council, the Commission and the EP

In the event of a successful negotiation the Commission can agree with the external party on the content and text of the agreement and the Council may authorise the Commission to sign the agreement on behalf of the EU. Subsequent to signing the agreement, the Commission will submit the agreement to both the Council and the EP who must both give their consent for the agreement to enter into force. The Council decides by a QMV, and the EP by a simple majority

219See Hayes-Renshaw, F, and Wallace, H, *The Council of Ministers* (Basingstoke: Palgrave Macmillan, 2006), p 90–94.

220Woolcock, fn 186 above, p 389).

221Article 207(3) TFEU subparagraph 3. The EP became a part of this process by virtue of the Lisbon Amendments

222As mentioned earlier, the EP has a Development Committee and a Rapporteur for Policy Coherence for Development (see Chapter Two of this thesis at 2.5.3.4. above).

223See European Parliament, Recommendation on the draft Council decision concluding the interim agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part (14757/2012 – C7-0369/2012 – 2008/0139(NLE)), A7-0190/2013, May 2013, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+REPORT+A7-2013-0190+0+DOC+PDF+V0//EN>, p 5/12.

vote.²²⁴ This differs from the trade and development cooperation agreements signed as association agreements where the Council adopts the decisions relating to association agreements by unanimity, and only with the assent of the EP.²²⁵ Ultimately, in contrast to the pre-Lisbon situation in which only the Council have the power to adopt trade decisions, and only with the assent of the EP in the context of association agreements, the Lisbon Treaty requires the consent of the EP for the conclusion of conventional trade agreements and association agreements. It is noteworthy that consent requires the EP's agreement on the international accord but does not enable the EP to modify the content of the instrument under consideration.²²⁶ Nevertheless, this power is not meagre and actually has far reaching effects. Indeed, most recently the EP withheld its consent on the SWIFT Agreement and made renegotiations with the US necessary.²²⁷ Whether, it could do same for trade is difficult to say in the light of the very political nature of this policy.²²⁸ For example, even the controversial EU-West Africa EPA which the EP has been urged not to ratify because of apparent incoherence with development objectives²²⁹ has been charged of opacity in its formulation.²³⁰

4.4.3. The implementation of EU trade policy – between the Commission and Member States?

Because EU trade agreements are mainly rules and measures applied by setting standards, it is difficult to allocate implementing power for EU external trade policy to any EU institution.²³¹

224Article 218(6)(a)TFEU. In contrast to QMV (fns 204 and 205 above), a simple majority is a majority of the Member States.

225Article 218(6) TFEU (ex Article 300(2) EC).

226Woolcock, fn 60, p 1.

227See Monar, J, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and its Implications', (2010) 15 *EFARev.* 143–51)

228See Chapter Two of this thesis, and also the above analysis.

229See for example, Concorde, fn 138 above, p 2.

230See fn 73 above.

231However, see the power of the EP and the council to adopt the measures defining the framework for implementing the common commercial policy pursuant to Article 207(2) TFEU.

In practice, the CCT is left to the Member States whose national authorities will apply the relevant provisions of the CCT²³² including the derogations discussed above.²³³ This is clearly different from the implementation of development policy, with the implications that the coherence of trade policy with development objectives is a matter that belongs to the decision-making stage of trade policy either within the context of association agreements or in the context of the EPAs.

4.4.4. Enforcement of EU external trade policy – limited to internal effects

As discussed in Chapter Two of this thesis, the ECJ has played a major role in deciding on the outer limits of EU competence in EU external relations, and whether this is exclusive or shared. However, by virtue of Article 218(11) TFEU, a Member State, the EP, the Council or the Commission may obtain the opinion of the ECJ as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.²³⁴ With specific regards to coherence, as discussed in Chapter Two, the Courts jurisdiction (or lack thereof) with regards to coherence is yet to be determined. Overall, the law as it relates to policy coherence for development, as to the overall coherence of EU external policies is still mired in complexity and subject to a great extent to the political dynamics of EU external relations. Moreover, with specific regards to the interaction between trade and development, the ECJ has previously refused to delve into assessing coherence where the CCP is involved. In both the

²³²See Eeckhout, fn 7 above, 452 – 454.

²³³See for example, European Commission (Directorate General, Taxation and Customs Union), 'Note to Delegates to the Customs Code Committee (Origin Section) - Consequences of the ending of preferential tariff treatment granted under the Cotonou agreement; arrangements in force from 1 January 2008', Brussels, 21 December 2007 TAXUD/C/5/RL D(2007) 14475.

²³⁴Furthermore, the ECJ could enforce the relevant directly effective rights of individuals under the agreements (see for example *Bresciani*, fn 172 above).

Gran Padano Cheese case²³⁵ and the *Banana* case,²³⁶ the ECJ considered the determination of coherence as a political question for the political branches of the Union to decide, not a legal question for the Court.²³⁷ In the *Banana* case where development interest were engaged albeit along with other interests,²³⁸ the ECJ expressly deferred to the institutions.²³⁹ Clearly the Court considers that it is not desirable to hold the EU and its institutions to a fixed position in a flexible world of foreign policy.²⁴⁰

4.4.5. On the HR/VP and the EEAS

It is already clear from the above analysis that there is no role in EU trade policy for the HR/VP and the EEAS in her service. Indeed not even an indirect participation in trade policy formulation is granted these respective post-Lisbon institution and body for coherence. For example, as indicated in Chapter Two of this thesis, even though the other policy-specific arms of the Council are chaired by the HR/VP, this is not the case for the Trade Council. The HR/VP or her representatives do not chair any of the Council Committees or Working Parties for trade.²⁴¹ Post as pre-Lisbon, these are chaired by the six-monthly rotating Presidency. Of course, this complete exclusion of the HR/VP and the EEAS from trade is in contrast to their involvement in development policy programming. The reason for this exclusion is not clear

²³⁵Case 263/87, *Denmark v. Comm'n* [1989] E.C.R. 1081.

²³⁶Case C-280/93, *Germany v Council*, 1994 E.C.R. I-04973.

²³⁷See for example Eeckhout, P, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP: 2004), p 447.

²³⁸These include development, agriculture, trade policy, fundamental rights, compliance with the Union's international obligations and the principles of non-discrimination.

²³⁹"[...] where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question . . . The Court's review must be limited in that way in particular if, in establishing a common organization of the market, the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility." (Case C-280/93, fn 236 above, at 88–81).

²⁴⁰Of course, the overall foreign policy and political nature of trade is subject to little or no doubt.

²⁴¹See Annex I to the Council Rules of Procedure annexed to Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU) [2009] OJ L325/35.

especially when the Lisbon Treaty has amalgamated the objectives of EU external action as it did under Article 21(2) TEU. Arguably, the lack of any clear reason for this exclusion may not be unconnected with the fact that it may be unconvincing - such as the issue of institutional turf battles discussed in Chapter Two of this thesis.²⁴² Indeed, such a reason would never make sense in light of the need for coherence as discussed in Chapter One of this thesis. This illustrates the specificity of trade policy despite the Lisbon changes, including the amalgamation of EU external policy objectives under Article 21(2) TEU. Suffice it to state that the specificity of EU trade policy post as pre-Lisbon means that ensuring its coherence with development objectives will as ever require political will, and this mainly from the Member States.²⁴³

4.5. Mali Case Study

The framework of EU trade policy including with special reference to SSA has been discussed above. Similar to the Mali case study on development policy in Chapter 3, this section discusses Mali as a case study to illustrate EU trade policy towards SSA. Further similar to the case study on development policy, this is not to undermine the possible different dynamics and effects of EU trade policy towards the different countries of SSA. This case study of EU trade policy towards Mali would aid a more specific assessment of policy coherence for development in addition to the overall framework provided above. Because the institutional dimension of trade policy is globally applicable to the region, the Mali case study focuses mainly on the instruments and the norms albeit not to the total exclusion of the institutional dimension. As indicated in the previous Chapter, the latter will only be mentioned where it is necessary to buttress or emphasise a point. It is noteworthy that even though there may be measures that

²⁴²At 2.4.1.

²⁴³See the above analysis.

Mali can take to help its international trade²⁴⁴ including with the EU, these are not the focus of this analysis which main concentration is the coherence of EU trade policy with development objectives.

4.5.1. Of Mali's Economy and International Trade with the EU: a contextual background

Mali is a landlocked West African LDC. As discussed in Chapter One, it was one of the first associates of Part IV of the Treaty of Rome being a former French colony. Mali's cooperation with the EU began in 1958 and the Union has remained one of its three main trading partners.²⁴⁵ Following its independent from France in 1960, Mali benefitted from the general trade regime under the successive Yaoundé and Lomé trade regimes discussed above. However, as a LDC, Mali later came to enjoy the preferential treatment granted to developing countries in general and LDCs in particular. For example, from 1995, Mali benefitted from the extensive market access granted to all LDCs by the EU within the special regimes of the GSP. Furthermore, from 2001 when the EBA was introduced under the GSP,²⁴⁶ Mali also came under the market benefits of the EBA which provides duty free and quota free access to the EU market for all products from LDCs, except arms.²⁴⁷ However, it is noteworthy that the impact of this non-reciprocal preferential treatment is limited owing to the small number of products exported by Mali,

244See for example, World Trade Organisation (WTO) *Trade Policy Reviews*: First Press Release, Secretariat and Government Summaries Mali: Press release, Press/TPRB/88, November 1998, available at https://www.wto.org/english/tratop_e/tptr_e/tp88_e.htm#The%20Secretariat, accessed 11 February 2015 where it is reported that Mali has been advised to diversify its exports, lower the charges levied on exports and extend its WTO commitments in order to take advantage of multilateral trade liberalisation and attract foreign investment. Mali operates restrictive taxes, special authorizations and prohibitions that are unlikely to encourage exports. For example, exports of precious substances in the unprocessed state are prohibited, and sales of these substances in the processed state are subject to the 3 per cent service provision contribution

245The other two are Côte d'Ivoire and Senegal. But Switzerland is a major outlet for Malian cotton (See WTO Trade Reviews, fn 244 above).

246See Regulations 416/2001 [2001] *OJ L*60/43 (of March 2001).

247See above.

namely raw materials that are generally subject to zero or very low MFN import duties in the importing countries. In general, Mali's exports cover only about half of its imports, leading to a chronic trade deficit. For example, from the EU, Mali imports capital goods, building materials and chemicals and pharmaceuticals. This is on a high side compared to Mali's export to the EU. Suffice it to state that the country's major export are cotton²⁴⁸ of which it is the biggest producer in SSA, gold,²⁴⁹ and livestock products.²⁵⁰ Out of these three products, cotton is the country's largest export earner with some 40% of rural households in Mali, or 2.5 million people reportedly dependent on it. With specific regards to coherence, it follows that at least cotton is a key export area where 'real trade' could make a difference for development, and where an unencumbered access to the EU market can spell a clear adherence to policy coherence for development. However, in contrast, it has been suggested that huge subsidies to EU farmers have ensured that Mali does not get a fair price for cotton.²⁵¹ Furthermore, it is suggested that eliminating these subsidies would boost West African cotton prices by 12.9% - and that translates into an annual loss of \$250m a year to farmers in Mali, Benin, Burkina Faso and Chad.²⁵² Having said that, it is noteworthy that this cannot rightly be adjudged a lack of adherence to policy coherence for development as investigated in this thesis. In the framework of EU external relations law and policies, the subsidies cannot rightly be considered an issue bordering on coherence in the interaction between trade and development.²⁵³ A pertinent focus

248 50 per cent of its merchandise export earnings.

249 17 per cent of its merchandise export earnings.

250 WTO *Trade Policy Review*, fn 244 above; also see Loquai, C, 'Supporting domestic accountability in developing countries: Taking stock of the approaches and experiences of German development cooperation in Mali', ECDPM *Discussion Paper* No 115, July 2011, p 7.

251 The cotton subsidy issue is not peculiar to the EU. China, India and the US also grant cotton subsidies (see Bunting, M, 'The Great Cotton Stitch-Up – Fairtrade Foundation lifts lid on Mali's entrenched poverty', *The Guardian*, 15 November, 2010). In general, the prices for cotton have been driven down over the last 40 years – losing half of its value when adjusted for inflation.

252 Ibid.

253 The subsidy is an element of the EU's Common Agricultural Policy (CAP), an internal EU policy that is outside the scope of this thesis (see fn 55 above). The CAP has earned criticism for its market distortions against developing countries. However, it is also criticised for the same effects against EU small farmers (see for example, 'The Greek Government's Position on Future CAP Reform', made available by the NGO CAP2020, available at

of an assessment of the coherence of EU trade policy with development objectives in Mali would centre on the EBA and the EPAs as contemporarily negotiated. In doing this, it should be remembered that one of the limitations of this research²⁵⁴ is the fact that while the country case study makes for manageability, the attendant limitations cannot be denied in so far as there are as much differences as similarities in the countries of SSA.²⁵⁵ Only the EPA that relates to Mali namely EU-West Africa EPA is covered in this Chapter as is pertinent.

4.5.2. Mali: between EBA and the EPAs,²⁵⁶ or no choice?

As discussed above, under Article 36(1) of the Cotonou Agreement, the EU and the ACP states agreed to conclude the EPAs.²⁵⁷ Although, these will be WTO-compatible trading arrangements that will remove progressive barriers to trade between them and enhance cooperation in all areas relevant to trade, the EPAs are framed as trade and development instrument under the Cotonou Agreement. The latter retains the non-reciprocal preferences of the Lomé regime while providing for transitional measures in the face of the proposed EPAs. The EU and the ACP States including the countries of SSA were originally committed under Article 37(1) of the Cotonou Agreement to conclude EPA agreements by 31 December 2007 or by a further date if extended pursuant to Article 37(4). Furthermore, Article 37(5) of the Agreement states that negotiations of the EPAs ‘will be undertaken with ACP countries which consider themselves in a position to do so’. Martenczuk²⁵⁸ posits that this introduces a measure of subjective evaluation

<http://cap2020.ieep.eu/member-states/greece>, accessed 16 July, 2015). In general, the coherence of CAP with development policy is a different topic that would require a separate research.

254See Chapter One of this thesis at 1.6.

255Indeed, with specific regards to trade policy, the EPAs are negotiated along the various regional economic groups around which the countries of SSA are organised (see Chapter One of this thesis at 1.0., especially fn 19).

256Specifically EU-West Africa EPA.

257See Article 36(1) of the Cotonou Agreement.

258Martenczuk, B, 'From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective' (2000) 5 *EFARev.*, 461 – 487, p 477.

into the obligations taken upon by ACP countries. Indeed, the negotiation of the EPAs has proven to be contentious and long drawn especially in the case of SSA.²⁵⁹ Suffice it to state that the negotiation in this context has been haunted by the traditional paradox created by the attempt to interweave trade policy and development policy.²⁶⁰ As argued above, this is not the same as policy coherence for development. Yet, there is no doubt that the two are related, and if well applied in practice and beyond acknowledgement in the instruments, would yield similar if not same result. In this regard, although the Cotonou Agreement provides that the non-reciprocal trade preferences of Lomé IV shall be maintained during the preparatory period leading up to the entry into force of the new trading arrangement, the unending extension to the original calendar²⁶¹ due to contention occasioned changes accordingly.²⁶² Detailed arrangements to apply from 1 January 2008 to products from the countries in question were set out in the Market Access Regulation (MAR).²⁶³ This was a bridging solution for countries that had concluded the EPA agreements but were not yet in a position to apply these EPAs because they were awaiting ratification. Essentially, the Regulation unilaterally anticipated the duty free access that the EU offered in the EPAs. However because of the extensions caused by the contentions in the negotiation of the EPAs, the EU withdrew the MAR's benefits from those countries that had not taken the necessary steps towards ratification of the EPAs concluded with the EU.²⁶⁴ Instead,

259It is noteworthy that the countries of the CARIFORUM (Caribbean country members of the ACP group) have all signed their individual EPAs.

260The contentions which relate mainly to WTO rules and other issues that relate to development are discussed below (4.5.3.).

261Negotiations began in 2004 and were expected to be completed by December 31, 2007. However, due to a lack of comprehensive agreement the deadline was moved to the end of 2008. This deadline has also been missed, as has a subsequent one for 2009.

262Indeed, the first regional interim EPA within the SSA region was only agreed in June 2013 between the EU and four Eastern and Southern African (ESA) states namely, Mauritius, Madagascar, Seychelles and Zimbabwe. It was endorsed by the European Parliament on 17 January 2013 and is currently awaiting ratification (further information available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=863>, accessed 29 January 2013).

263Council Regulation (EC) No. 1528/2007, 'Market Access Regulation'.

264See Regulation (EU) no 527/2013 of the European Parliament and of the Council of 21 May 2013 amending Council Regulation (EC) No 1528/2007 as regards the exclusion of a number of countries from the list of regions or states which have concluded negotiations [2013] *OJ L165/59*. These countries are removed from Annex I to Regulation (EC) No 1528/2007 where they were added on concluding an EPA. The regulation took effect from 1st

in compliance with the WTO rules, and in fairness for other developing countries outside the Cotonou framework, the EU would apply the GSP to these countries.²⁶⁵

In contrast to the non-LDC ACP states which must sign the EPA or come under the GSP, the Cotonou Agreement stipulates that the LDCs are not obliged to sign an EPA in order to retain their present level of access to the EU. Because of the fragility of their economies, they can choose to keep their existing non-reciprocal trade preferences even if they do not wish to open their own markets to the EU.²⁶⁶ The implication of this in practice is the application of different trade instruments and preferences to the different countries even within the same economic sub-region of SSA. While this could rightly be deemed a factor of incoherence in so far as it renders regional integration almost impossible in SSA,²⁶⁷ it also constitutes incoherence in another pertinent way. For example, in West Africa (or ECOWAS) where there are 3 non-LDCs forced

October, 2014. So far, only Cameroon is benefitting from the MAR because it started to provisionally apply the EPA between the Union and Central Africa (Council Decision of 20 November 2008 on the signature and provisional application of the interim agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part (2009/152/EC) [2009] *OJ L57/1*) as of 4 August 2014. Following its conclusion and ratification, the interim EPA with Eastern and Southern Africa (ESA) started to be provisionally applied as of 14 May 2012 between the EU and Mauritius, Madagascar, Seychelles and Zimbabwe (Council Decision of 13 July 2009 on the signing and provisional application of the Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part (2012/196/EC) [2012] *OJ L111/1*; Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part [2012] *OJ L111/2*).

²⁶⁵For example, although Comoros and Zambia initialled the interim ESA EPA, they have neither signed nor ratified it yet and therefore their exports to the EU are governed by the GSP. The same applies to Nigerian as it has not ratified the EU-West Africa EPA. Other interim EPAs that have not been applied yet include SADC - Botswana, Lesotho, Mozambique, Namibia, Swaziland; ECOWAS - Ghana, Côte d'Ivoire; EAC - Burundi, Kenya, Ruanda, Tanzania, Uganda (see DG Taxation and Customs Union, 'The Countries of Africa, the Caribbean and the Pacific (ACP)' available at http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_785_en.htm. accessed 15 May 2015).

²⁶⁶'Regional Economic Partnership Agreements', ECDPM, Cotonou Infokit 14, 2011, p 2; however, see Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements [2007] *OJ L348/1*, Article 7 where the EU specifies that it is preferable that LDCs which are also ACP States base their future trade relationship with the Community on Economic Partnership Agreements.

²⁶⁷Regional Integration is an aspect of development policy in this context.

to open their market to EU's exports on account of the EPA with the EU,²⁶⁸ and 12 LDCs not forced to open their market to EU's exports on account of the EBA, not only would regional integration and its prospects for development be hampered, but also even the arguably better position of the LDC's under the EBA²⁶⁹ are endangered. Hence, for an LDC like Mali in West Africa, there may not be an option than to join the EPA so as not to truncate the process of regional integration. This is foreseeable since one of the reasons why Nigeria is yet to ratify the EPA is the existence of two different schemes of tariff.²⁷⁰ Effectively, although Mali is not directly compelled by the Union to choose the EPA over the EBA, it is nevertheless placed in a position in which it may have no choice than to do so. From all indications, it is not clear which of the instruments Mali presently benefits from. For while the Commission lists the country to be under the EBA, the EU-Mali National Indicative Programme (NIP)²⁷¹ refers to the EU-West Africa EPA as the instrument regulating EU trade relations with Mali. From the perspective of the development community, this would be anti-development. Indeed, it is noteworthy that the development community is of the view that the EU should extend the EBA to the whole of West Africa instead.²⁷² However, as mentioned above, the EU is of the view that the LDC's will be in the same position under the EPA as under the EBA. It is not clear whether this is in terms of benefit or loss. As Bartels explains, despite the generous preferences of the EBA, in 2006 over

²⁶⁸See EU-West Africa EPA, fn 68 above.

²⁶⁹As mentioned above, the EU regards the EBA as its most effective trade instrument for development.

²⁷⁰EU-West Africa EPA was endorsed by ECOWAS Heads of State and Governments in July 2014 (see Final Communiqué: Forty-Fifth Ordinary Session of the Authority of ECOWAS Heads of State and Government, *ECOWAS Press Release*, No: 134/2014, 10 July 2014, Accra, Ghana, para 15-17, available at <http://news.ecowas.int/presseshow.php?nb=134&lang=en&annee=2014>, accessed 12 September 2015). Yet, three countries of West Africa namely Nigeria, Burkina Faso and The Gambia are yet to ratify this agreement. Nigeria argues that this will not only paralyse internal trade and blow up regional integration, but will also increase the costs of controlling the rules of origin as LDCs will be forced to protect themselves from the re-export of products entered duty free in the 3 non LDCs of West Africa. This it says will in turn open the door to enormous tax evasions, and add to the loss of tariff revenues particularly in Nigeria, following the implementation of ECOWAS Common External Tariff (CET). Nigeria presently benefits from the GSP, while the other two countries benefit from the EBA (see European Commission, Practical guide to the new GSP trade regimes for developing countries). On the rules of origin (see

²⁷¹See Chapter Three of this thesis.

²⁷²See Concorde, fn 139 above; and also Berthelot, fn 55 above.

half of all EBA imports into the EU were accounted for by non-SSA countries.²⁷³ While there is no specific data on Mali in this regard, the recent choice of the withdrawal of development aid over trade preferences as sanction illustrates that EU trade relations with Mali is not economically significant to the latter. If this is the case, it may not make a difference especially for Mali, and perhaps to the other LDCs of West Africa, which way the pendulum swings. Herein is a major dilemma for the assessment of policy coherence for development in relation to EU trade policy towards SSA. While Mali is used as a case study, its situation may not apply across the board in West Africa and in SSA as a whole.²⁷⁴ In general, it has to be conceded that unlike more developed countries of SSA like Nigeria, and perhaps other LDCs even, there is no doubt that Mali justifiably or unjustifiably requires help in order to become integrated into the world economy and to derive the benefits of that integration to the fullest to aid its development. Indeed, under the integrated programme of technical assistance for LDCs set in place by WTO and other organizations, Mali has requested assistance in various fields. These include the introduction of trade finance and export promotion structures, the search for foreign trade and investment partners, quality control, trade information collection and management, and rationalization of customs procedures. These are supply-side, human and institutional constraints which inhabits the ability of a country to trade.²⁷⁵ Mali is also particularly landlocked – a feature which hinders its ability to better integrate in the global trading system.

273Bartels, fn 125 above; Indeed, in 2012 UNCTAD Report indicated that China accounted for 26.4% of the SSA LDC Exports surpassing the EU (at 20.4%). In general, it is arguable that Europe's historical trade relations with SSA is under threat in the light of the emergence of BRICS (Brazil, Russia, India, China and South Africa). For a recent discussion relating to this see for example Oliver, M, and Zgovy, E, *The Impact of China and India on Sub-Saharan Africa: Opportunities, Challenges and Policies* (London: Commonwealth Secretariat, 2011). For some, albeit not all the reasons for the lack of success with the EBA, as perhaps with other EU preferences towards SSA see 4.5.3. below.

274This is a key limitation of this study (see 1.6. Above).

275These are some of the constraint that contributed to the erosion of preference under the successive association agreements in addition to the imperfection of the systems (see Garrity, fn 131 above, p 102; also see Goodman, S, "EEC: The Economic of Associate Membership", *JDS* (January 1969), p 140-141; and Lister, M, *The European Community and the Developing World* (Aldershot: Gower, 1988), p 53-55).

For example, the transit of export and import goods through the territory of at least one neighbouring State and the frequent change of mode of transport result in high transaction costs and reduced international competitiveness.²⁷⁶ To address these human and institutional constraint depends on the availability of financial support,²⁷⁷ and it is trade issues like this that could benefit from the added value of the EDF or PAPED. Indeed, while this cannot take the place of 'real trade', it may be undeniably needed for real trade to evolve. This will be financially aiding trade. And the answer to the question of how this relates to policy coherence for development as it relates to trade is as clear as the answer to the question of what exactly is the relationship between the key financial instruments of EU development policy in the context of EU external relations with SSA and EU trade policy towards the region on the one hand, as well as how much concession the EU would be expected to make to be deemed to have done enough with regards to adherence to policy coherence for development. Of course, the EU cannot realistically be expected to completely sacrifice its trade and economic interests on the altar of its commitment to a favourable integration of the developing world into the world economy or to development policy.²⁷⁸ However, there is still much that the EU can do to alleviate some of the trade policy-oriented difficulties which are arguably as much present in the EBA context for Mali, as they are in the conventional EPAs which the country could potentially embrace. At all times, these would depend on what EU Member States are willing to concede vis-a-vis the EU, including in the light of the need to conform to WTO rules.

276Landlocked Developing Countries (LLDCs), available at <http://unctad.org/en/Pages/ALDC/Landlocked%20Developing%20Countries/UN-recognition-of-the-problems-of-land-locked-developing-countries.aspx>; accessed 27 June 2015.

277As discussed in Chapter Four of this thesis, the role of EU development aid in this regard is debatable.

278See Article 21(2)(e) TEU and Article 3(5) TEU; and also Article 19 Cotonou Agreement.

4.5.3. Of the EPAs, the conformity to WTO rules and the concessions for development

Although the key controversy that surrounded the negotiation of the EPAs in the context of EU external relations with SSA were mainly about conformity with the WTO rules, at the centre is how the application of these rules could be applied in a way that respects or takes into account development objectives.²⁷⁹ For example, the question of liberalising "substantially all trade" within a "reasonable length of time" could be interpreted in a way that is either more favourable or less favourable to development. The EU had initially requested for 80% (liberalisation of trade) over 15 years (as reasonable length of time). However, following years of contention regarding this position,²⁸⁰ the EU agreed on a flexible interpretation of the threshold required to liberalise substantially all trade, in order to be compatible with the rules of the WTO. In recognition of the special characteristics of West Africa, a deal was struck at 75% of trade to be liberalised over the next 20 years. While this is considered significant for the overall relations between EU and the region,²⁸¹ its significance for the assessment of coherence should not be forgotten. For this can be adjudged an attempt to adhere to policy coherence for development in so far as development was the reason behind this concession. Nevertheless, this is not to say that the EU cannot conveniently do more to enhance policy coherence for development.²⁸² For example, it has been argued that the issue of guaranteed entry to the EU market over and above market access on a tariff free and quota free basis is a long standing issue that is often neglected²⁸³ despite its potential to contribute to poverty alleviation and hence improve the coherence of trade policy with development objectives. At the heart of this is that EU market

279See Articles 2(3) and 53(3) of the EU-west Africa EPA.

280The EPA negotiations had been on-going for about 12 years.

281See for example, Ramdoo and Bilal, fn 69 above.

282See Concorde, fn 139 above; and also Berthelot, fn 55 above; and also in general European Parliament, Economic Partnership Agreement EU-ACP: Facts and Key Issues, Office for the Promotion of Parliamentary Democracy, 2011.

283McQueen, M, 'EU Preferential Market Access conditions for least Developed Countries', *Intereconomics*, March/April 2002, p 102.

entry is governed by a different set of rules depending on the product a preference country wishes to export to the EU markets. The pertinent key rules in this regard are the sanitary and phytosanitary (SPS) rules²⁸⁴ and Rules of Origin (RoO).²⁸⁵ These apply both to LDCs and non-LDCs, and hence will apply to EU trade with Mali and indeed SSA whether they benefit from the EBA or the EPAs. The implication of these rules is that market access on a tariff free and quota free basis is not the same as guaranteed market entry.²⁸⁶ Hence, they have rightly or wrongly been considered hidden restrictions which dilute whatever benefits is conferred by duty and quota free access granted by the EU to ACP exports.²⁸⁷ This is not to say that there are no good reasons for these rules. For example, there is no doubt that SPS are necessary for good reasons, namely health and food safety. Similarly, the RoO has as its principle aim, to ensure that the benefits of the agreement go to the recipient countries and that the preferences are not abused by other third party countries.²⁸⁸ Nevertheless, international trade experts have revealed that the rules sometimes go beyond what is necessary and hence substantially limit the potential value of the offer to the EU's trade partners.²⁸⁹ Indeed, with particular regards to the SPS, the principle of equivalence²⁹⁰ does not reflect the required asymmetry. In the same vein, the

284Article 25 – 31 EU-West Africa EPA, fn 68 above, (and also Annex D to that instrument).

285Article 2 EU-West Africa EPA, fn 68 above, (and also Annex A to that instrument).

286'Trade Negotiation Issues', fn 49 above, p 67.

287Smith, H, *European Union Foreign Policy: What it is and what it is not* (London: Pluto Press, 2002), p 189-190.

288See Trade Negotiation Step by Step, fn 87 above, p 3; also see Eeckhout, fn 7 above, p 453.

289See for example, McQueen, fn 283 above; and also see Onguglo, B, F, 'Developing countries and unilateral trade preferences in the new international trading system', in Mendoza, M, R, *et al* (ed.) *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Washington, D.C.: The Brookings Institution Press/Organization of American States, 1999) Chapter 4 (what is cited here is from an independently numbered copy of this work, p 4), where he explains the different dimensions of RoO namely the origin criteria, consignment conditions and documentary evidence. The origin criteria is normally defined in terms of the goods that are wholly produced and manufactured in a beneficiary country, or goods that have been sufficiently worked, processed and transformed into a new and different article. The local content requirement can go as high as 60 per cent, 50 per cent, or lower at 35 per cent. Many schemes allow for the local content qualifying benchmark to be cumulated from various beneficiary countries or the preference-giving country. Clearly, this will always be a question of extent.

290This requires that each Party shall accept the SPS measures of the other Party as equivalent, even if such measures differ from their own or those that are used by third countries marketing the same product (Article 28 EU-West Africa EPA, fn 68 above).

complexity and complications arising from many variations of RoO as they apply to different products and countries has also been deemed in need of review and simplification due to the anti-development high cost associated with it. These are some of the issues that the EU could address in a bid to enhance the coherence of trade policy with development objectives. Indeed, the EU is committed to simplification and review of the RoO as part of the EPAs by virtue of Article 37(6) of the Cotonou Agreement. But as Nigeria's reason for not ratifying the EU-West Africa EPA illustrates, a mutually satisfactory end has not been reached with regards to the review and simplification of the RoO in the light of policy coherence for development. As will be remembered from Chapters Two and Three, policy coherence for development is about taking into account the development objectives of the developing country partners of the EU. Effectively, the needs of the latter should be the guiding principle. However, having said that, it has to be reiterated that realistically, this will at all times remain a question of extent especially in the light of the indeterminacy of policy coherence for development as it relates to trade. Overall the assessment of policy coherence for development in the interaction between trade and development is as complex as the interaction between the two. The interweave of trade and development is only circumstantial and does not detract from the specificity of EU external trade policy. Against this background, it has to be accepted that there is no simple way of evaluating the coherence of trade policy with development objectives, more so in the context of the EU's complex and elaborate system of regional trade agreements and preferences.²⁹¹ Moreover, due to the indeterminacy of policy coherence for development which renders coherence at all times a question of extent, it may well have to be accepted that any incoherence in this context could be explained as what Hoebink defined as political or economic based on conflicting interests and complexity of issues.²⁹² The only remedies are to tolerate

²⁹¹McQueen, fn 283 above, p 103.

²⁹²Hoebink, P, 'The Coherence of EU Policies: Perspectives from the North and the South' (2005) Commissioned

incoherence, mitigation, compensation, additional/flanking policy.²⁹³

4.6. Conclusion

From the foregoing, there can be little or no doubt that post as pre-Lisbon, the EU trade policy towards SSA remains distinctly specific even while embracing the nexus between trade and development. This specificity despite the amalgamation of EU external objectives at Lisbon is most clearly illustrated by the exclusion from trade policy, of the post Lisbon institution and body for coherence namely the HR/VP and the EEAS in her service. Against this background, it is argued that while the pre and post-Lisbon institutional bifurcation between EU trade policy and its development policy could compromise the coherence of trade norms with development objectives, the overall specificity of trade policy means that even institutional coherence will not prove an eternal panacea for the former. Furthermore, while highlighting the institutional potentials to enhancing the coherence of trade with development objectives despite the exclusion of the HR/VP and the EEAS, it concludes that the coherence of trade policy with development objectives beyond the acknowledgement of the need for same in the instruments of trade policy ultimately depends on the political will of the EU Member States. Nevertheless, it concedes that this is at all times a question of extent, and one whose answer may be as much difficult to determine as it will continue to be mired in controversy. This is mainly because of the sophisticated and complex nature of the interaction between trade and development in instrument and in practice as the Mali case study further illustrates, and also because of the indeterminacy of the requirement of policy coherence for development including with specific

Study, Center for International Development Issues Nijmegen, Brussels, p 19.

293Ibid. The last remedy again brings to mind the question of the relationship between trade and development aid, especially as it relates to policy coherence for development.

regards to trade in EU external relations law. While the latter may equally apply to the other policies, it can be argued that the complexity and sophistication of the interaction between trade and development means that the challenge of policy coherence for development as it relates to trade is different from the same challenge in the interaction between development and foreign and security policy as will now be discussed.

Chapter Five

5.0. The CFSP in SSA: navigating the security-development nexus and what Mali illustrates about the diplomatic F and S¹ of an indefinite CFSP

5.1. Introduction

The question of coherence of EU external action in general, and the coherence of other EU external policies with development objectives² take a different turn in the face of EU foreign and security policy. This is not only because of the inextricable nexus between development and security,³ but also because of the complex dynamics of EU foreign and security policy under the CFSP framework. As discussed elsewhere in this thesis,⁴ post as pre-Lisbon, the CFSP remains ‘subject to distinct rules and procedures’ despite the amalgamation of EU external objectives at Lisbon.⁵ However, this does not mean that there is a clear delineation of the Union's CFSP competence. Indeed, in contrast to the equally indefinite scope of EU development policy,⁶ the outer boundaries of the Union's CFSP competence may be beyond the grasp of law.⁷ Nevertheless, this last statement does not imply the submergence of all other EU external policies under the CFSP in practice.⁸ Particularly illustrative is the context of EU external action towards SSA where a wide array of EU external policies are engaged. While two of the core policies of EU external action towards SSA have been discussed in the last two Chapters of this thesis,⁹ the present Chapter and the next centre on the CFSP and the CSDP

1For an example of the distinction between the foreign (*F*) and security (*S*) dimensions of the CFSP see Trybus, M, *European Union Law and Defence Integration* (Oxford: Hart, 2005), p 306 where he also distinguishes between these and the *D* (defence policy) dimension; also see Missiroli, A, ‘European Security Policy: The Challenge of Coherence’ (2001) 6 *EFARev*, 177, p 184 for the same lines of distinction.

2Policy coherence for development (see Chapter Two of this thesis at 2.5.1.1., 2.5.1.2. and 2.5.2.).

3See the following analysis at 5.2.3.

4See in general Chapters One and Two of this thesis.

5Article 24(1) TEU.

6See Chapter Three of this thesis especially at 3.2.3.

7See the following analysis at 5.2.3.

8And the present statement does not detract from the possibility of same (see the following analysis, especially at 5.2.3.).

9See Chapter Three on development policy and Chapter Four on trade policy.

respectively.¹⁰ As indicated in Chapter One,¹¹ although it is not uncommon to see the CFSP used as an umbrella term that also covers EU activities under the CSDP,¹² the latter is *de facto* functionally distinct from the CFSP.¹³ Undoubtedly, there is a commonality of *S* to both the CFSP and the CSDP as they together embody what is more generally known as ‘EU security policy’.¹⁴ However, the latter distinctly provides the Union with an operational capacity for civilian missions and military operations and hence centres mainly on the *S* including as it relates to the *D*.¹⁵ Contrastingly, the CFSP mainly revolves around the diplomacy in *F* especially as it relates to the economic and political dimensions of the *S*¹⁶ even though it is generally indefinite in scope.¹⁷

10The Chapter which comes after the CSDP does not centre on a policy but on the Joint Africa-EU Strategy (JAES) - an instrument aimed at enhancing coherence in EU external action towards Africa in general. The last Chapter is the Conclusions to this thesis.

11See Chapter One of this thesis at 1.0. above.

12 Which is veritably an integral part of the former.

13The distinct functional and institutional logic of the CSDP is discussed in Chapter Six of this thesis at 6.4.

14See for example, Missiroli, fn 1 above.

15See Chapter Six of this thesis (especially at 6.1.) including with regards to the distinction between the *S* and the *D* (and also with regards to the exclusion of the latter from the scope of the analysis).

16In importing security into EU external action, Article 30(6)(a) of the Single European Act refers to ‘political and economic sides of security’. The economic aspect of security ‘deals with armaments [...] industrial products whose trade is determined to a great extent by economic considerations’. In contrast, political aspect of security ‘focuses on how state entities construct their position in the broader geopolitical environment through unilateral initiatives or participation in multilateral institutional mechanisms’ (Koutrakos, P, *Trade, Foreign Policy and Defence* (Oxford: Hart, 2001), p 166; also see Van Vooren, B, and Wessel, R, *EU External Relations Law, Text, Cases and Materials* (Cambridge University Press, 2014), p 384 where they simply divided the key CFSP objectives between ‘political’ (reinforcing democracy and respect for human rights) and ‘diplomatic’ (preventing and solving conflicts, coordinating emergency situations). Although they also added ‘economic’ (support of economic reforms and regional objectives), and ‘legal objectives’ (supporting the development of the rule of law and good governance), as the following analysis illustrates, this Chapter is mainly concerned with the ‘diplomatic’ which is also arguably political especially in the context of the analysis of security. Having said that, it has to be noted that a definition of the concept of security is eschewed from this enquiry as the concept is an essentially contested one in that it is so value-laden that it has no one correct answer (Gallie, W, ‘Essentially Contested Concepts’, *Proceedings of the Aristotelian Society* (1956) 56 *N.S.* P 167-98. In fact, the ECJ posits that ‘security’ can even be a matter of perception rather than hard fact (Case C-120/94 *Commission v Greece (re: Former Yugoslav Republic of Macedonia)* [1996] ECR I-1513, at para 54). In the same vein, the concept of foreign policy does not merit a definition in so far as it is only a conceptual framework in this context (see for example Allen, D, ‘Who speaks for Europe’ in Peterson, J, and Sjursen, H, (eds.), *A Common Foreign Policy for Europe?* (London: Routledge, 1998,) p 44: ‘Foreign policy is primarily about the definition of ends, or objectives, and only then about deciding how to pursue them... Foreign policy, therefore, is best seen as an attempt to design, manage and control external activities [...] so as to protect and advance agreed and reconciled objectives.’ Indeed, as explained in Chapter One (at 1.0. particularly at fn 3), it is arguable that EU external action in general is foreign policy.

17See Chapter Five of this thesis (at 5.2.3).

This Chapter examines EU external action towards SSA under the CFSP framework with a view to determining how it relates to policy coherence for development, and also the overall coherence of EU external action *vis-à-vis* synergy in the sequencing of available policy options. In doing this, the Chapter does not seek to account for the entirety of CFSP actions in SSA. Rather, the enquiry centres on the norms, instruments and institutional aspects of the CFSP¹⁸ especially as they relate to the preventive diplomacy of the political dimension of *S* in the *F*.¹⁹ As a central theme of this thesis, the dimension brought by the post-Lisbon High Representative for Foreign Affairs and Security Policy (HR/VP) and the European External Action Service (EEAS) is also discussed. Although the CFSP has been briefly distinguished from the CSDP, it is noteworthy that neither can be extensively discussed without references being made to the other. Consequently, while the following analysis is mainly focused on the CFSP, the CSDP is mentioned as is necessary.²⁰

The Chapter submits that the Lisbon Treaty entrenches the indefinite and potentially illimitable scope of the Union's CFSP competence which continues to depend on distinct rules, instruments and institutional procedures post as pre-Lisbon. In doing this, it especially highlights the invariably inextricable overlap between the relevant norms of the CFSP and development objectives, and suggests that the unsettled question of hierarchy in the context of the security-development nexus theoretically implies that policy coherence for development as it relates to the CFSP may amount to a *façon de parler* (mere rhetoric). Against this controversial suggestion, it argues that the invariably inextricable nexus between security and development could in any event also imply that the work of the HR/VP and the EEAS under the CFSP could

¹⁸However, see the Joint Africa EU Strategy (JAES) in Chapter Seven of this thesis.

¹⁹See fns 1 and 15 above.

²⁰The reverse is also the case as can be seen in Chapter Six of this thesis on the CSDP.

automatically be considered compliant with the requirement of policy coherence for development if not development measures by other means. However, using Mali as a case study, the Chapter illustrates that while the EU can boast of long term CFSP conflict preventive measures which revolve around the *S* as an extension of the *F*, these are mainly regionally-focused and are not necessarily always complemented with urgent *ad hoc* and targeted CFSP diplomatic measures as may be required for the construction of a united whole *vis-à-vis* synergy in the sequencing of policy options available to prevent violent crisis. Markedly, it concedes that although the use of *ad hoc* and targeted CFSP measures may be constrained by resource limitations, and perhaps an element of deference or indifference based on the historical factors discussed in Chapter Two,²¹ these do not detract from the attendant implications for overall coherence of EU external action towards SSA. It also does not from the fact that the influence of the HR/VP and the EEAS regarding the relevant unfavourable factors may be quite limited, if at all possible.²²

Similar to the last two Chapters, the first section of this Chapter provides the contextual background to the CFSP, and pertinently analyses the legal basis and the scope of its objectives with special reference to SSA. The latter also provides another opportunity to further delimit the scope of analysis as it relates to the CFSP in this Chapter.²³ The second section presents a pertinent overview of the instruments of the CFSP diplomacy as it relates to security with special reference to SSA. This is followed by a pertinent discussion of the institutional dimension of CFSP in the third section. The fourth and final section centres on Mali as a case

21 See Chapter Two of this thesis at 2.2.4.

22 Invariably, the field of diplomacy as an aspect of foreign policy is one often mired in secrecy so that all instruments at play may sometimes be difficult to determine existentially. This analysis is only concerned with overt instruments.

23 See the previous page for some delimitation.

study. Apart from the general discussion of policy coherence for development in the framework part of the Chapter, a case study of the CFSP in Mali will also aid the assessment of the overall coherence of EU external action *vis-à-vis* synergy in sequencing of the policy options available to resolve a crisis.²⁴ Similar to the previous two Chapters,²⁵ the case study focuses mainly on the pertinent instruments and norms of the CFSP towards SSA as they apply to Mali.²⁶

5.2. The legal basis, scope of objectives and instruments of the CFSP with special reference to SSA

This section aims to discuss the legal basis and scope of objectives of the CFSP with special reference to SSA. Invariably, the legal basis is imperative in so far as the thesis is first and foremost a legal analysis. However, both the legal basis and the scope of objectives will aid the assessment of coherence, and also provide a pertinent background for the subsequent analysis of the instruments and institutional structures of the CFSP with special reference to SSA. Nonetheless, prior to a discussion of the legal basis and the objectives, it is imperative to provide a brief contextual background to the CFSP as it relates to the focus of this thesis.²⁷

²⁴See for example, European External Action Service, Strategy for Security and Development in the Sahel, EEAS, 2011, available at http://eeas.europa.eu/africa/docs/sahel_strategy_en.pdf, accessed 12 January, 2013 (hereinafter the Sahel Strategy); also with specific regards to the Mali crisis, the United Nations Security Council (UNSC) members insisted on the sequencing of the options available to resolve the crisis, including political and diplomatic efforts (Zounmenou, D, 'Is a Military Intervention in Mali a Realistic Option?', *ISS Today*, Institute of Security Studies, South Africa, 25 June 2012, available at <https://www.issafrica.org/iss-today/is-a-military-intervention-in-mali-a-realistic-option>, accessed 15 November 2015).

²⁵On development policy and trade policy respectively.

²⁶Essentially, it does not revisit the institutional dimension since this is globally applicable to the region.

²⁷As discussed at Chapter Two of this thesis (at 2.3.2.), the CFSP evolved differently from EU trade and development cooperation with SSA under the ex-Community. Hence, its distinct evolutionary background becomes a pertinent contextual background even if only to the extent of a brief mention. Indeed, it is arguable that many of the legal and institutional distinctions between the CFSP and the non-CFSP external action have their origins in their distinct historical backgrounds (Vanhoonacker, S, 'The Institutional Framework' in Hill, C, and Smith, M, (ed.) *International Relations and the European Union* (OUP, 2005), p 68).

5.2.1. The CFSP and the coherence of EU external action towards SSA: a distinct contextual background

The discussion in this section does not aim to provide a ‘legal’ history of the CFSP.²⁸ Rather, it provides the background to some of the principles and politico-historical characteristics that continue to shape the distinctiveness of the CFSP with implications for coherence especially in the context of EU external action in SSA.

Although the field of EU external action in general could be regarded as foreign policy,²⁹ there is no doubt that the CFSP is the anchor of EU foreign and security policy even if not incontestably the anchor of EU external action in general. Generally, the origin of EU foreign policy as it relates specifically to the CFSP has been traced back to the failed European Defence Cooperation (EDC).³⁰ Arguably, this is because the EDC was the first attempt by the relevant countries of Europe to integrate for international political ends beyond (and even before) the economic integration under the ex-Community.³¹ However, the EDC was originally defence oriented³² and could veritably be distinctly linked to what is today the CSDP framework.³³ Indeed, post-EDC, foreign policy coordination was continued through the European Political Cooperation (EPC) albeit still outside the framework of the ex-Community.³⁴ The pertinent modalities of the EPC and how it morphed into the CFSP has been discussed earlier on³⁵ and

28This has been done before (a selection includes: Trybus, fn 1 above, especially Chapters 1 and 2; Koutrakos, fn 16 above, especially Chapter 2; and Zwaan, J, ‘Foreign Policy and Defence Cooperation in the European Union: Legal Foundations’ in Blockmans, S, (ed.) *The European Union and Crisis Management: Policy and Legal Aspects* (The Hague: TMC Asser Press, 2008), Chapter 2.

29See fn 16 above.

30See Trybus, fn 1 above.

31Ibid.

32Ibid.

33Albeit not without metamorphosing through the Western European Union (WEU) as discussed in Chapter Six of this thesis (see in particular at 6.2.1).

34See Chapter Two of this thesis, especially at 2.2.3.

35Ibid.

does not merit a revisit in this section.³⁶ In contrast, it suffices to state that this 'political cooperation machinery which deals on the intergovernmental level with problems of international politics'³⁷ was recognised as 'distinct from, and additional to the activities of the institutions of the Community which are based on the juridical commitments taken by the Member States in the Treaty of Rome.'³⁸ Although it can be argued that the CFSP as it emerged on the back of the EPC is based on legal commitments,³⁹ these are not the same as juridical commitments.⁴⁰ This is not surprising bearing in mind the nature of foreign policy in a strict sense. The field of foreign policy in general is considered a special domain in which governments defend their rights to take decisions as they see fit both for the protection of their sovereignty and their national interests.⁴¹ Because it revolves around strategies of international interactions that require flexibility, foreign policy is said to elude any grasp of law.⁴² Although EU foreign policy in the strict sense as practised under the CFSP can be distinguished from 'international mechanisms of conduct of foreign policy,'⁴³ this would arguably be as much with regards to the requirement of greater flexibility as to other related matters. Indeed, for a polity which consists of 28 Member States, EU foreign policy is significantly more complex than it is for States.⁴⁴ Nevertheless, because the EU is a legal entity which owes its existence and its functioning to law, the policies of its external relations are embedded in law even if they are

36This does not mean that the EPC will no longer be mentioned in the course of this analysis.

37See Bulletin of the European communities, No 9-1973, p 18.

38Ibid. Juridical commitments are usually marked by the administration of law and the possibility of judicial proceedings.

39See 5.3. and 5.4. below.

40See 5.4. below.

41See Wessel, R, 'Differentiation in EU foreign, Security, and Defence policy: Between Coherence and Flexibility' in Trybus, M, and White, N, (ed.) *European security Law* (OUP, 2007), p 226; also see Smith, M, 'Diplomacy by Decree: The Legalisation of EU Foreign Policy' (2001) 39 *JCMS* 1, p 79-104.

42De Baere, G, *Constitutional Principles of EU External Relations* (OUP, 2008) p 1; also see Hurd, D, 'Developing the common foreign and security policy' (1994) 70 *IA* 3, p 422.

43Koutrakos, fn 16 above, p 15.

44Khaliq, U, 'The external action of the European Union under the Treaty of Lisbon' in Trybus, M, and Rubini, L, (ed.) *The Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham: Edward Elgar, 2012), p 260.

arguably determined by politics.⁴⁵ This applies to the CFSP even though the way it is governed by law may be limited by the constraints of politics more than the non-CFSP EU external relations. In fact, despite the legalisation of the CFSP, it has been contended not only that all CFSP instruments are political in nature,⁴⁶ but also that the scope and nature of EU's powers under the CFSP in general do not lend themselves to strict legal analysis.⁴⁷ Indeed, even the EU has found it hard to categorise the nature of its CFSP competence which does not expressly fall under the shared or exclusive categories of EU competences.⁴⁸ In any event, as discussed in Chapter Two albeit with specific regards to the requirement of coherence, the EU is assessed according to its own commitments.⁴⁹ By and large, it is noteworthy that the difference between the EU's juridical commitments under the non-CFSP external action and the non-juridical commitment under the CFSP affects the requirement of coherence in EU external action.⁵⁰

If EU external relations law is regarded as incomprehensible and impenetrable by traditional legal standards,⁵¹ the law as it relates to the CFSP is a major contributory factor in this regard.

45See Peers, S, 'EC Frameworks of International Relations: Co-operation, Partnership and Association', in Dashwood, A, and Hillion, C, *The General Law of EC External Relations*, (London: Sweet & Maxwell, 2000), p175; also see in general, Lister, M, *The European Community and the Developing World* (Aldershot: Avebury, 1988); and also Hill and Smith, fn 27 above.

46See for example, *Fact Sheets on the European Union*, European Parliament, 2009, p 34.

47See Eeckhout, P, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, 2004), p 145; also see for example, Van Elsuwege, P, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency' (2010) 47 *CMLRev.* 987-1019, where he points out that 'mutual (political) solidarity' of the Member States (which is at the heart of the CFSP pursuant to Article 24 TEU) is not a traditional normative legal concept.

48See Article 2-6 TFEU; also see for example Koutrakos, fn 16 above, p 1 where he described the CFSP as *sui generis*. In contrast, it has also been muted that the Union's CFSP competence might be shared (see Bono, R, 'Some Reflections on the CFSP Legal Order' (2006) 43 *CMLRev* 337, at 364. The failure to provide clarity with regards to the CFSP competence has been criticised Denza, E, 'Lined in the Sand: Between Common Foreign Policy and Single Foreign Policy' in Tridimas, T, and Nebbia, P, (eds.), *EU Law for the Twenty-First Century* (Oxford: Hart Publishing, 2004), 259, p 266-7; also see House of Lords, European Union Committee, European Union – Ninth Report, Session 2002-2003, para 52 where it is also suggested that this may have been politically motivated.

49See Chapter Two of this thesis (at 2.5.3.7.), particularly p 89.

50This would mainly be the case with the requirement of coherence as it relates to synergy in the sequencing of available policy options (see the following analysis).

51Holdgaard, R, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (The Hague: Kluwer Law International, 2008), p 2.

This is not only because the Union embarked on legalising what traditionally eludes the grasp of law,⁵² but because it is also doing this in an undeniably difficult context of a *Staatenverbund*⁵³ of 28 nation States with varying foreign policy interests. The difficulties are not made easier by the creation of a *sui generis*⁵⁴ common foreign and security policy. It coexists with the foreign and security policy of Member States⁵⁵ while providing the latter an enabling framework to adopt and implement a common stance without undermining their national sovereignty.⁵⁶ Suffice it to state that the 'common' of the *C* in the CFSP⁵⁷ is distinct from the notion of same as applies to the non-CFSP external relations.⁵⁸ This neither means that the image of the CFSP as a purely intergovernmental form of international cooperation can be sustained in the light of the Treaty provisions,⁵⁹ nor that the legal and political requirement of coherence, including policy coherence for development apply any less to the CFSP than the non-CFSP external action.⁶⁰ Rather, although the requirement of coherence has gone beyond the initial need to

⁵²See the previous page.

⁵³See Chapter Two of this thesis at 2.3.1.

⁵⁴See fn 48 above; also see Chapter Two (at 2.3.1.), especially at fn 112.

⁵⁵It is noteworthy that the Treaties preserve the competence of the Member States to conduct their foreign and security policies (see Declaration 13 concerning the CFSP and Declaration 14 concerning the CFSP annexed to the Treaties).

⁵⁶Indeed, the new Article 24(2) TEU provides that '[...] the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions'. On their part, the Member States are required to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity, and to refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations (Article 24(3) TEU (ex-Article 11(2) TEU). It has been suggested that this implies that Member States are bound by a positive obligation to actively develop the CFSP (see Hillion, C, '*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union', in Cremona, M, (ed.) *Developments in EU External Relations Law* (OUP, 2008) p 30).

⁵⁷Also see the CSDP as discussed in Chapter Six of this thesis.

⁵⁸Such as the Common Commercial Policy (CCP) as discussed in Chapter Four of this thesis.

⁵⁹See for example Van Vooren and Wessel, fn 16 above, 397. In this regard, Trybus has since explained that EU policies are better seen as either more intergovernmental or more supranational as opposed to definite extreme categorisations using 'intergovernmental' or 'supranational' (see Trybus, fn 1 above).

⁶⁰However, it is noteworthy that policy coherence for development takes another dimension in the context of the CFSP, if not also the CSDP. This is mainly due to the inextricable nexus between security and development (see the following analysis; and also Chapters Three and Six of this thesis).

manage the interaction between the CFSP⁶¹ and the non-CFSP external action,⁶² the requirement of coherence between the two at all times remain a critical aspect of the coherence discourse. Significantly, equally at all times, the potential role of institutions in enhancing coherence is recognised even while the segregation of the institutional procedures of the two aspects of external action is maintained. Illustrative is the introduction at Lisbon of the HR/VP and the EEAS for the purposes of enhancing coherence between the ever separate CFSP and non-CFSP external action, as well as across EU external policies in general.

5.2.2. The legal basis for the CFSP

As indicated in Chapter One, it would be too simplistic to regard the legal and procedural distinction between the CFSP and the non CFSP as the primary issue at the heart of the coherence discourse in EU external action. However, this distinction remains relevant in so far as it is one of the key challenges facing the Union in its quest to construct a coherent external action especially towards SSA. In this regard, one of the major marks of the maintained dual EU external action in the post-Lisbon era is the division of the core substantive and procedural provisions of the CFSP and non-CFSP external action between the TEU and the TFEU respectively.

The EU's competence for the CFSP and the scope of objectives of same is enshrined in Article 24 TEU.⁶³ In particular, this Article provides that 'the Union's competence in matters of [CFSP] shall cover all areas of foreign policy and all questions relating to the Union's security [...]'.⁶⁴

61Here meaning EU foreign policy in a strict sense - which incorporates the political and diplomatic dimensions of security as its extensions.

62From the former's time under the EPC framework till its present time under the CFSP framework.

63Ex-Article 11 TEU as amended.

64The second part of this provision says 'including the progressive framing of a common defence policy that might lead to a common defence' (see Article 24(1) TEU (ex-Article 11 TEU) as amended), subparagraph 1. This second

Furthermore, the Article provides that 'the Union shall conduct, define and implement a [CFSP], based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions'.⁶⁵ Beyond these expression of the union's general CFSP competence,⁶⁶ Article 24 TEU⁶⁷ also bears the core institutional procedure for the CFSP.⁶⁸ It follows that this Article could be regarded as the substantive and procedural legal basis for the CFSP.⁶⁹ However, in so far as the legal basis for fields of activity under the CFSP is concerned, the relevant provisions are those that specify the various *modus operandi* of the CFSP. While these are generally listed together in Article 25 TFEU, it is the subsequent Articles which bear the legal (or political) implications⁷⁰ of the different *modus operandi* that are often listed in the relevant final CFSP instruments in practice.⁷¹ Having said that, it has to be remembered that the flexibility and pragmatism of EU external relations law and practice extends to the question of legal basis.⁷² Effectively, there are CFSP instruments of diplomacy for which there are no express indication of their legal basis.⁷³

part of the provision clearly relates to the CSDP.

65 And these, 'within the framework of the principles and objectives of its external action' (Article 24(2) TEU).

66 Which are further discussed below as they relate to the scope of objectives of the CFSP (see 5.2.3.)

67 Ex-Article 11 TEU as amended.

68 Article 24(1) TEU (ex-Article 11 TEU as amended), subparagraph 2 (this and other pertinent provisions relating to the CFSP are discussed below at 5.4.).

69 However, this does not extend to international agreements (see Article 218 TFEU).

70 See 5.2.1. above regarding the legalisation of foreign policy; and also 5.2.3. below on the pertinent provisions regarding CFSP instruments.

71 Illustrative are some of the pertinent CFSP instruments for SSA discussed below (see 5.2.3. below).

72 See Chapter Two of this thesis at 2.2.2. However, it is noteworthy that Article 352 (4) TFEU (dubbed the 'rubber paragraph') 'cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy'.

73 See 5.2.4. below.

5.2.3. The scope of CFSP objectives with special reference to SSA: of an indefinite foreign and security policy, and the security-development nexus

The transition from the EPC to the CFSP⁷⁴ is not only a transition from ‘informal’ cooperation to closer ‘legal’ cooperation but also an expansion from ‘all major questions of foreign policy’, to ‘all areas of foreign *and security* policy’.⁷⁵ Arguably, this is more a formal expression of the Union's venture into security as a dimension of foreign policy than an attempt to define the limits of EU foreign policy. Indeed, although the evolution of the security dimension of foreign policy is often attributed to the CFSP,⁷⁶ there is evidence that EPC practice was not limited to collective economic sanctions and condemnation of human rights violations. Rather, the CFSP extended to active diplomacy including the active sending of observers and mediators into areas of conflict.⁷⁷ Without needing to define the notion of security,⁷⁸ there is no doubt that both the resolution of active conflict and conflict prevention fell within the ambit of the EPC. Indeed, as mentioned above, the notion of security,⁷⁹ is a generic term which can assume many functions. In this regard, it can be argued that EU foreign and security policy was as unclearly delineated in scope under the ECP framework⁸⁰ as it presently is under the CFSP framework. In fact, post-Lisbon, the Treaties simply provide that the Union ‘shall conduct, define and implement a CFSP [...]’.⁸¹ Beyond this, there is no specific allocation of any objectives to the CFSP. This is a change from the pre-Lisbon era when the CFSP had its own distinct objectives, and these provided the main starting point for the analysis of its scope.⁸² The original CFSP objectives which are now

74As discussed at 5.2.1. above.

75Ex-Article 11(1) TEU.

76However, see Chapter Two of this thesis at 2.1.

77See in general, Denza, E, *The Intergovernmental Pillars of the Union* (OUP, 2002), p 41-48.

78See fn 16 above.

79As the notion of foreign policy (ibid.).

80Koutrakos, fn 16 above, p 9.

81Article 24(2) TEU; Article 2(4) TEU: ‘the Union shall have the competence to define and implement a CFSP [...]’.

82Essentially, in the pre-Lisbon era, the CFSP was objective-centred, and beyond the broad reference to ‘all areas of foreign and security policy’ did not provide any other indication of its scope of coverage outside its stated objectives (see Eeckhout, fn 47 above, p 141; and also Dashwood, A, ‘Article 47 TEU and the Relationship

integrated with all the other EU external action goals under Article 21(2) TEU include:

‘[...] to safeguard the common values, fundamental interests, independence and integrity of the Union [...]; to strengthen the security of the Union in always; to preserve peace and strengthen international security [...]; to promote international cooperation; to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.’⁸³

Despite the fact that the Treaties did not link these directly to the CFSP at Lisbon, Dashwood explains that the CFSP potentially retains these original distinct objectives even if integrated with other objectives of EU external action under Article 21(2) TEU.⁸⁴ Indeed, otherwise, the distinct rules and procedures of the CFSP become either unnecessary or reserved only for the CSDP, with the former seen as a policy aspect that has disappeared. Of course, the prevalent practice runs contrary to this last part of the last sentence.⁸⁵

Having said that, it is noteworthy that the objectives are not only in-exhaustive,⁸⁶ but are also worded in very broad terms which are open to interpretation.⁸⁷ As Dashwood notes, ‘[...] there is no way of anticipating in detail the range of actions it may be found appropriate for the Union to take in order for, for instance to safeguard its own security or to help maintain that of the international community’.⁸⁸ Similarly, it can be argued that the promotion of international

between first and second pillar competences’ in Dashwood, A, and Maresceau, M, *Law and Practice of EU External Relations* (Cambridge University Press, 2008), p 73; but also see Wessel, R, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (The Hague: Kluwer, 1999), p 59 for the contrasting view that it is not necessarily the case that the objectives of a policy coincide with the areas it purports to cover).

⁸³Ex-Article 11 TEU. These objectives are currently found in Article 21(2)(a-c) TEU.

⁸⁴Dashwood fn 82 above, p 102; also see Chapter Two for the same line of argument regarding how the different EU external policies retain their distinct objectives despite the amalgamation of EU external objectives in Article 21(2) TEU.

⁸⁵Although every CSDP action falls under the ambit of the CFSP legal framework, not all CFSP actions are CSDP.

⁸⁶See Trybus, fn 1 above, p 64 who posits that the words ‘all areas of foreign and security policy’ indicates that this list of objectives is not exhaustive.

⁸⁷See Koskeniemi, M, ‘International Law Aspects of the Common Foreign and Security Policy’ in Koskeniemi, M, (ed.) *International Law Aspects of the European Union* (The Hague: Kluwer, 1998) p 28.

⁸⁸Dashwood, fn 82 above, p 73.

cooperation is all-encompassing. Indeed, not only does Peers suggest that even the decision over the types and contents of agreement adopted under the ex-Community might be construed as foreign policy matters under the CFSP,⁸⁹ Wessel equally explains that the CFSP objective of international cooperation includes development cooperation.⁹⁰ Although the latter has been challenged in the post -Lisbon context,⁹¹ this does not detract from the fact that the CFSP is indefinite post as pre-Lisbon. The power lies with the Council to define its scope in practice pursuant to Article 24(2) TEU and 2(4) TEU.⁹²

The main concern in the pre-Lisbon era was to ensure that the CFSP did not encroach on the non-CFSP dimension of EU external action under the ex-Community pursuant to the non-affectation clause in favour of the latter.⁹³ However, this pre-Lisbon dynamic has been changed

89See Peers, fn 45 above, p175; also see Hillion, C, 'Common Strategies and the Interface Between E.C. External Relations and the CFSP: Lessons of the Partnership between the E.U. and Russia' in Dashwood and Hillion, fn 45 above, p 290) for the suggestion that since the creation of the CFSP at Maastricht, EU external action including under the ex-Community framework are shaped in the light of CFSP principles.

90See Wessel, fn 82 above, p 67; and Eeckhout fn 47 above, p 153 where he explains that it has never been the Council's intention to exclude any areas of external action, apart from a specific area like trade, from under the CFSP; and also Cremona, M, 'External Relations and External Competence: the emergence of an integrated policy' in Craig, P, and De Burca, G, (eds.), *European Union Law: An Evolutionary Perspective* (OUP, 1999), p 171-173; and for a contrastingly reverse view, see Arts, K, and Dickson, A, 'EU development cooperation: from model to symbol?' in Arts, K, and Dickson, A, *EU Development Cooperation: from Model to Symbol* (ed.) (Manchester University Press, 2004), p 7, where they posit that EU development policy has CFSP aspects. Having said that, it is noteworthy that Member States are not allowed to conduct development cooperation measures under the CFSP framework (Wessel, fn 82 above, p 67). Arguably, such limitation on the CFSP is only in relation to legal instruments (for example, the ECJ have apparently distinguished CFSP acts 'which by their nature, are capable of having legal effects' (Joined Cases C-402/05 P and C-415 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi)* [2008] ECR I-06351, para 202); also see Case C-91/05 *Commission v Council (ECOWAS)* [2008] ECR I-3651, paras 33 and 60 for reference to CFSP 'measure having legal effects'). In practice, there are CFSP instruments (such as Declarations and Action Plans) which do not have any legal effect (see 5.3.3. below). Significantly, these type of instruments traverses development cooperation and the CFSP in scope of coverage. As discussed in Chapter Seven of this thesis this makes it somewhat difficult to categorise the Joint Africa EU Strategy (JAES) for which these type of instruments are used.

91This is mainly because of the unresolved question of hierarchy regarding the relationship between security and development (see the next page below), and the procedural implications of this (see 5.4. below).

92See fn 90 above; also see Joined Cases C-402/05 P and C-415 P (*Kadi*), fn 90 above, at para 202, where the ECJ explained its role as ensuring 'that acts which *according to the Council* fall within the scope of the common foreign and security policy [...]'. [author's emphasis]; also see in general, Case C-91/05 (*ECOWAS*), fn 90 above. It follows that the pre-Lisbon criticism of the failure to provide clarity in this regard (see for example Denza, fn 48 above, at 266-267) remains valid in the post-Lisbon era.

93As enshrined in ex-Article 47 TEU. This is mainly with regards to CFSP acts which by their nature, are capable of having legal effects (Joined Cases C-402/05 P and C-415 P (*Kadi*), fn 90 above, para 202).

by the introduction of a 'mutual' non-affectation clause at Lisbon.⁹⁴ This development *prima facie* renders the two dimensions of external action equal. However, with specific regards to coherence, there is a difference between the pre-Lisbon and post-Lisbon dynamics of regulating the interaction between the CFSP and non-CFSP external action. For example, in the pre-Lisbon era, it may not have stimulated as much thinking as it would today that:

‘[...] if an expansive definition (and practice) [of CFSP instruments] is adopted, the CFSP remit would probably extend to the [non-CFSP dimension of EU external action]. In other words, consistency and coherence may eventually materialise but somewhat at the expense of the [non-CFSP] dimension.’⁹⁵

Indeed, in the pre-Lisbon era, the non-affectation clause in favour of the non-CFSP external action meant that it was not legally possible to stretch the CFSP to cover the non-CFSP fields of external action especially expressly.⁹⁶ Contrastingly, the mutual non-affectation clause introduced at Lisbon implies a different dimension to the indefinite scope of the CFSP. Arguably, the post-Lisbon CFSP has no legal boundaries, and being illimitable in scope, could not only delve into any aspect of EU external action, but also potentially displace the non-CFSP dimensions of external action. This may seem more of a theoretical than a practical point. But in an ever evolving Union,⁹⁷ which is clearly a *Staatenverbund*,⁹⁸ it would be safe to say that

⁹⁴See Article 40 TEU. Whether this renders obsolete the distinction between CFSP acts with legal effects and those without (see fn 90 above) is difficult to say.

⁹⁵Missiroli, fn 1 above, 177, p 183. This is similar to the position of the ECJ in *Opinion 1/94 (WTO)* [1994] ECR I-5273, para 60 with regards to the scope of development policy (see 3.3.2. above); Krenzler, H, and Schneider, H, ‘The Question of Consistency’ in Regelsberger, E, *et al* (ed.), *Foreign Policy of the European Union: from EPC to CFSP and Beyond* (London: Lynne Rienner, 1997), p 139-140.

⁹⁶See to that effect, ex-Article 47 TEU; and Case C-91/05 (*ECOWAS*), fn 90 above. It is noteworthy that the Council had argued in this case that ex-Article 47 TEU was intended to protect the CFSP and non-CFSP competences equally (at para 43). But, this argument was not accepted by the ECJ.

⁹⁷See Chapter One of this thesis at 1.6.

⁹⁸See Chapter Two of this thesis at 2.3.1.

developments that tilt the balance of power further in favour of the Member States cannot be completely ruled out.⁹⁹

Pertinently, the dilemma regarding the scope of the CFSP relates mainly to development policy.¹⁰⁰ This is due to the intensity of the nexus between security and development.¹⁰¹ It is not the focus of this section to engage with the wide-ranging debate associated with the security-development nexus.¹⁰² Rather, it suffices for the purposes of this analysis to capture what is at the heart of the concept namely that there can be no security without development, and *vice versa*.¹⁰³ The import of this in practice can be surmised in two sentences. On the one hand, policies towards security may legitimately become part of development policy in so far as they will contribute to development by enhancing security. On the other hand, policies towards development may legitimately become part of security policies in so far as they will increase security by enhancing development. There is no controversy about this¹⁰⁴ - as there is regarding

99As discussed below, the CFSP procedure is more intergovernmental than the procedure for the non-CFSP external action. The latter is more supranational (see especially trade policy as discussed in Chapter Four of this thesis).

100It is doubtful that the CFSP will ever stretch as far as to subsume trade policy (indeed, see fn 92 above; and also Chapter Four of this thesis in general on the specificity of trade policy).

101See for example, Case C-91/05 (*ECOWAS*), fn 90 above. For more on the security-development nexus see for example Klingebiel, S, (ed.), *New Interfaces between Security and Development: changes concepts and approaches* (Bonn: Dt. Inst. für Entwicklungspolitik, 2006); Stewart, F. 'Development and Security' (2004) 4 *CSD* 3, p 261 — 288; and Page, J, 'Three Issues in Security and Development' (2004) 4 *CSD* 3, p 299-308; and also Organisation for Economic Co-operation and Development (OECD), Development Assistance Committee (DAC), 'Is it ODA? Note by the Secretariat', Working Party on Statistics, 2001; for a contrasting view see Beall, J, *et al*, 'On the Discourse of Terrorism, Security and Development' (2006) 18 *JID*, p 51-67; and with specific regards to the EU context see Robinson, C, 'Integration and integrity in EU policies for security and development', an assessment prepared for the Association of World Council of Churches related Development Organisations in Europe (APRODEV), published in *New interfaces between security and development: changing concepts and approaches* (Bonn: German Development Institute (DIE), 2006).

102Ibid.

103Ibid.

104Illustrative are the relevant instruments of EU development and security policies including those that are specific to EU external action towards SSA (see for example, Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Development Policy: 'The European Consensus' [2006] *OJ* C46/1; and A Secure Europe in a Better World--European Security Strategy' (hereinafter the EU Security Strategy), Brussels, December 12, 2003; EU Programme for the Prevention of Violent Conflicts, endorsed at the Goterberg European Council, June 2001, available at www.eu2001.se/static/eng/pdf/violent.pdf, accessed November 19, 2011, para. 3-4; and with specific regards to SSA see Partnership Agreement between the members of the African, Caribbean and

whether the focus should primarily be on development as a precondition for security or on security as a precondition for development.¹⁰⁵ Significantly, the EU is considered to align with the latter even if its partners would prefer the former.¹⁰⁶ In this regard, while it may be controversial, it can be argued that the issue of policy coherence for development as it relates to the CFSP amounts to a *façon de parler* in the light of the unsettled question of hierarchy between security and development. This is more so when the EU is judged by its own standard.¹⁰⁷ Nevertheless, it does not detract from the fact that a failure to adopt a CFSP measure when necessary for coherence *vis-à-vis* synergy in the sequencing of available policy options to resolve a crisis would arguably constitute a breach of policy coherence for development.

Undoubtedly, the intense nexus between security and development mainly exists in the context of EU external action towards SSA.¹⁰⁸ Suffice it to state that SSA elicits what can be described as a 'European security continuum',¹⁰⁹ and this, since the post-Cold War era when the region was mired in internecine conflicts with disruptive and undermining effects on EU development activities in the region. Although conflict prevention was not mentioned in the objectives of the

Pacific Group of States of the one part, and the European Community and its Member States of the other part (hereinafter the Cotonou Agreement) (2000) *OJ L*317/3 (First Revision (2005) *OJ L*287/1; Second Revision (2010) *OJ L*287/3), especially Articles 1 and 11; and the Cairo Plan of Action attached to the Cairo Declaration which followed the Africa-Europe Summit (Cairo, 2000).

105See for example, Nkundabagenzi, F, '*L'Union Européenne est la Prévention Des Conflits Africains*' (Brussels, Les Rapports du Grip 2000) where he explains that while the EU primarily focuses on security as a precondition for development, the SSA partners of the EU considers development as a precondition for security; also see Onah, F, 'The Lome, Cotonou and the Africa-EU Strategic Partnership Agreements in Comparative Perspective' in Eze, O, and Sesay, A, (ed.), *Africa and Europe in the 21st Century* (Lagos: NIIA, 2010), p 30; 'Towards a Joint Africa-Europe Partnership Strategy: The EU-Africa Partnership in Historical Perspective' Issue Paper 1, ECDPM, December, 2006, p 2.

106Ibid. Specifically, the EU Security Strategy directly expresses the view that 'security is the first precondition for development' (see EU Security Strategy, fn 104 above, p 13).

107See Chapter Two of this thesis at 2.5.3.7. Of course, this controversy has not been resolved otherwise.

108See fns 104 and 105 above; and also Chapter Three of this thesis. As indicated in Chapter One at 1.2., Mali as a specific case study for the examination of coherence in the law and policies of EU external action towards SSA is marked by fragility occasioned by poor development index and violent conflicts. In essence, Mali is a representation of the fragility of SSA as a whole *vis-à-vis* poor development index and violent conflicts, even if these are in varying degrees.

109Shepherd, A, 'The European Security Continuum and the EU as an International Security Provider' (2015) 29 *Global Issue* 2, p 156-174.

CFSP,¹¹⁰ it eventually evolved as the overarching aim in that 'security continuum' albeit not without complicating 'the conceptualisation and operationalisation of the Union as a security provider.'¹¹¹ By and large, by the year 2000, 'conflict prevention' and all it connotes,¹¹² was not only made a part of EU development cooperation with the countries of SSA,¹¹³ but was also pursued as an aspect of foreign and security policy under the CFSP framework.¹¹⁴ Hence, while the security-development nexus was being addressed within development cooperation, this did not stop similar programmes of conflict prevention under the CFSP framework. Having the two competing frames breeds inter-institutional conflicts in relation to the Union's security and conflict prevention programmes.¹¹⁵ However, these relate mainly to the internal constitutional question of competence. Illustrative is the recent case of *ECOWAS*¹¹⁶ which in fact arose in the context of EU external action towards SSA. Significantly, in this case, the ECJ did not only confirm the arguably illimitable scope of the CFSP as an overarching framework especially in relation to the security-development interface,¹¹⁷ but also the need for coherence between the CFSP and non-CFSP activities in this regard.¹¹⁸

110Of course, it would fall under the CFSP objective of promotion of international peace and security.

111See Shepherd, fn 109 above; and also in general Chapter Six of this thesis.

112Think the scope of the objective of promotion of international peace and security (and see in this regard Chapter Six of this thesis).

113See Article 11 of the Cotonou Agreement; and in general Chapter Three of this thesis.

114And indeed, the CSDP.

115Sicurreli, D, 'Framing security and development in the EU Pillar structure: How the views of the European Commission affect EU Africa policy' (2008) 30 *European Integration* 2, p 217-234, at 221.

116Case C-91/05 (*ECOWAS*), fn 90 above.

117See 5.3.1. and 5.3.2. below. This is further illustrated by the pertinent key instruments of the CFSP as it relates to SSA. Although it is not the focus of the next section, it is noteworthy that the instruments may be helpful in clarifying the scope of the CFSP (Wessel, fn 82 above, p 70; and, Eeckhout, fn 47 above, p 143).

118Case C-19/05 (*ECOWAS*), fn 90 above, paras 84-88, and 107-109; also see 5.4. below on the institutional dimension of the CFSP and on whether the inter-institutional conflicts ended at Lisbon.

5.3. CFSP instruments for diplomacy with special reference to SSA¹¹⁹ – a pertinent analysis

In contrast to the non-CFSP external action, the conduct of CFSP does not rely on legislative acts.¹²⁰ Rather, it relies on other type of instruments and decisions which are non-legislative.¹²¹ It is not necessary to go into the pre and post-Lisbon categorisation of the CFSP which are arguably as ambiguous as the Union's CFSP competence.¹²² Indeed, as indicated earlier¹²³ the Chapter does not attempt to account for the entirety of CFSP instruments in relation to SSA.¹²⁴ Rather, it concentrates on instruments that are most pertinent to the discussion of policy coherence for development and the determination of coherence as it relates to synergy in the sequencing of available policy options with a specific focus on CFSP diplomacy. Even then,

119One major factor that *prima facie* distinguishes EU external action under the CFSP framework in SSA from its action under the non-CFSP competence is the distinct instruments of the CFSP. In the light of the illimitable scope of the CFSP, it would be impossible to survey all the instruments of the CFSP in the context with EU external action towards SSA in any coherent way. Instead, this analysis will concentrate on the main themes in the study of coherence especially as it relates to the security-development nexus and with a particular focus on diplomacy.

120By virtue of Article 24 TEU, legislative acts that arise by virtue of the ordinary legislative procedure under the non-CFSP competences are expressly excluded from the CFSP.

121The previous categories of CFSP decisions under ex-Article 12 TEU included principles of and general guidelines for the common foreign and security policy, Common Strategies, Common Positions, Joint Actions, and systematic cooperation between Member States in the conduct of policy. This was changed at Lisbon to the following: '(a) [...] general guidelines (b) [...] decisions defining (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); (c) [...] systematic cooperation between Member States in the conduct of policy' under Article 25 TEU [Author's emphases]. Clearly, what used to be known as Common Position and Joint Action have been renamed so that these are now respectively known as decision defining actions to be undertaken by the Union and decision defining positions to be taken by the Union. Furthermore, the Treaties have dropped the use of what was formerly known as Common Strategies. It has been suggested that this was expunged from practice long before the Treaty of Lisbon (see De Baere, fn 42 above, p 115). Nevertheless, the current Article 22 TEU bears semblance to the former provision on Common Strategy under ex-Article 13 TEU (this is discussed in relation to the JAES in Chapter Seven of this thesis). Otherwise, the common strategy as provided for under ex-Article 13 TEU was never used in the context of EU external action towards SSA. In any event, it is noteworthy that these are not the only instruments available for CFSP actions. For example, the products of systematic cooperation are found in Presidential Declarations, or in 'Declarations', 'Council Conclusions', and other 'Council decisions', and Action Plans' which are never linked to any legal bases. These could be regarded as CFSP 'political instruments' (see in this regard De Baere, fn 42 above, p 113; Denza, fn 79 above, p 134-136; and Koutrakos, P, *EU International Relations*, (Hart), p 403). There are also other instruments which relate specifically to active CFSP diplomacy such as demarches, restrictive measures (sanctions), political dialogues and active sending of observers and mediators into areas of conflict (see 5.2.3 above in relation to the EPC). For a comprehensive list of CFSP instruments, see Germany's Foreign Affairs Office website available at http://www.auswaertigesamt.de/EN/Europa/Aussenpolitik/GASP/InstrumenteGASP_node.html, accessed 20 June 2016.

122Ibid. On the ambiguity of the categorisation of CFSP instruments see De Baere, fn 42 above, p 123 where he specifically criticises the general designation of all CFSP instruments with the umbrella term of 'decisions'.

123At fn 119 above.

124These would have entailed discussing all the instruments listed at fn 121 above as they relate to SSA.

not all the instruments of diplomacy are covered. In particular, the investigation concentrates on Decisions especially in relation to the overarching instrument of the CFSP towards SSA and the appointment of the EU Special Representative (EUSR).¹²⁵ The overarching instrument of the CFSP towards SSA is embedded in the Decision previously known as Common Position.¹²⁶ The appointment of the EUSR would usually be embedded in the Decision formerly known as Joint Action.

5.3.1. The CFSP Common Position on Conflict Prevention in Africa:¹²⁷ an overarching CFSP instrument for EU external action towards SSA

Common Positions define positions to be taken by the EU with regards to a particular matter of a geographical and/or a thematic nature.¹²⁸ It binds the Member States requiring them to 'ensure that their national policies conform to Union positions'.¹²⁹ However, it also defines positions to be taken by the EU with regards to 'a particular matter' of 'a geographical and/or a thematic nature'. Hence, it also holds the prospects of enhancing the overall coherence of EU external action even if the relevant provision of the Treaties does not directly reflect this.¹³⁰ Substantially, 'a particular matter' with a root in the CFSP framework could have many branches and possibly extend to non-CFSP external action. Pertinently illustrative is the Common

¹²⁵The latter aids the determination of coherence as it relates to synergy in the sequencing of available policy options. This is not to deny the fact that there may be other instruments which are not easily determinable existentially in the light of the culture of secrecy that generally permeates the field of diplomacy (see fn 121 above).
¹²⁶See fn 121 above.

¹²⁷See Council Common Position 2005/304/CFSP on Conflict Prevention, Management and Resolution in Africa and repealing Council Common Position 2004/85/CFSP) on Conflict Prevention, Management and Resolution in Africa [2005] *OJ* L97/57 (hereinafter 'Common Position on Conflict Prevention in Africa'). The latter was preceded by the first two Common Position on Conflict Prevention in Africa (Council Common Position 97/356/CFSP concerning conflict prevention and conflict resolution in Africa [1997] *OJ* L153/1; Council Common Position 2001/374/CFSP of 14 May 2001 concerning conflict prevention, management and resolution in Africa [2001] *OJ* L132/1).

¹²⁸Article 29 TEU (ex -Article 15 TEU).

¹²⁹*Ibid.* In this regard, it fosters vertical coherence between the Union and the Member States. As indicated in Chapter One of this thesis (at 1.3.) vertical coherence is outside the scope of this thesis.

¹³⁰Article 29 TEU (ex -Article 15 TEU).

Position on Conflict Prevention in Africa.¹³¹ This is the key CFSP instrument encapsulating EU strategic objectives in SSA,¹³² and in that, an illustration of the illimitably all-encompassing scope of the CFSP *vis-à-vis* the potentially all-encompassing notion of conflict prevention. As indicated above,¹³³ although conflict prevention is not expressly listed as an objective of the CFSP in the Treaties, it eventually evolved as the overarching aim in the 'European security continuum'. If the notion of conflict prevention complicates 'the conceptualisation and operationalisation of the EU as a security provider', it is because it borders on a 'security continuum' traversing all stages of conflict, and by implication all aspects of EU external policies.¹³⁴ Indeed, the Common Position on conflict Prevention in Africa addresses conflict prevention and security holistically¹³⁵ including with direct references to trade and development cooperation.¹³⁶ Suffice it to state that the notion of conflict prevention can rightly be regarded as a metonym for EU security policy in its comprehensive form.¹³⁷ It does not only blur the

¹³¹See fn 127 above.

¹³²For this view, see Whitman, R, 'The EU and Sub-Saharan Africa: developing the strategic culture of the Union's Foreign Security and Defence Policy' Paper presented at the 2009 EUSA Biennial Conference, April 23-25 2009, Los Angeles, p 12 (whether this is in relation to both the CFSP and non-CFSP competences is debatable). Indeed, although the Common Position on Conflict Prevention in Africa makes reference in its title to Africa (as opposed to SSA), the fact that the instrument mainly applies to SSA is not difficult to understand in the light of the prevalence of the security-development nexus in the region. In fact, Article 6(4) of this Common Position lists the relevant African sub-regional organisations which are those in SSA.

¹³³At 5.2.3.

¹³⁴See for example, Preamble, para 8, Common Position on Conflict Prevention in Africa, fn 127 above: 'Effective conflict prevention requires strategies to create enabling conditions for a stable and more predictable international environment, and comprehensive and balanced aid and developmental assistance programmes to alleviate the pressures that trigger violent conflict; the importance of economic factors in conflicts in Africa, as well as the potential of diplomatic and economic measures for the prevention and resolution of violent conflicts also have to be taken into account'; and also see Article 1(5) of the same instrument 'The EU shall develop a proactive, comprehensive and integrated approach, [...]. As a part of this, and to enhance capacity for early action, a yearly survey shall continue to be drawn up [...], so as to identify and monitor potential violent conflicts and presenting the policy options necessary to prevent their outbreak or recurrence.'; also see EU Security Strategy, fn 104 above, p13; and for example Chapter Three and Chapter Six of this thesis on development policy and the CSDP respectively (in contrast to these, it is arguable that the contributions of trade policy, if any, to conflict prevention is arguably only indirect (see Chapter Four of this thesis). For more on EU conflict prevention policy see in general, Kronenberger, V, and Wouters, J, (ed.) *The European Union and Conflict Prevention. Policy and Legal Aspects* (The Hague: TMC Asser Press, 2005, p 208).

¹³⁵*Ibid.*; also see in general, Articles 1 – 12 of the Common Position on Conflict Prevention in Africa, fn 127 above.

¹³⁶See Article 5, Common Position on Conflict Prevention in Africa, fn 127 above; and also fn 135 above.

¹³⁷See European Commission, High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council: The EU's comprehensive approach to

distinction between prevention, management and resolution, but also the distinction between *preventive diplomacy*, conflict resolution and peacekeeping.¹³⁸ Invariably, the security-development nexus is central to the discourse especially in the light of the requirement of policy coherence for development. In this regard, the Common Position on conflict prevention in Africa expressly recognises the interdependency of development and security.¹³⁹ However, for all it may cover in principle, the Common Position on cannot on its own foster coherence between the CFSP and development policy in practice. Indeed, the paradox of the Common Position is that even though it could refer to all areas of EU external action and their mutual complementarity,¹⁴⁰ it is in general declaratory in form and content,¹⁴¹ and can be described as a guideline¹⁴² for the whole of the EU.¹⁴³ By implication, it confines coherence to the political will of the relevant institutions.¹⁴⁴

Having said that, it has to be remembered that the main focus of the analysis in this Chapter with a view to determining coherence in EU external action towards SSA is specifically on *preventive diplomacy* as it relates to the political dimension of security. This will now be

external conflict and crisis, Brussels, 11, December, 2013, JOIN (2013) 30 final; and Kronenberger and Wouters, fn 134 above.

138 Author's emphasis. Indeed, the first Common Position on conflict prevention in Africa was adopted following the European Council's recognition of the importance of *preventive diplomacy*, conflict resolution and peacekeeping in Africa (see Council Conclusions on *preventive diplomacy*, conflict resolution and peace keeping in Africa, 4/12/1995). It is noteworthy that all emphasis on *preventive diplomacy* in the body of the analysis and in this fn are the author's.

139 See for example Preamble, paras 8 and 9 Common Position on Conflict Prevention in Africa, fn 127 above.

140 See for example, Preamble, para 6, Common Position on Conflict Prevention in Africa, fn 127 above; and Article 3 Common Position 2000/420/CFSP concerning EU support for the Organisation of African Unity peace process between Ethiopia and Eritrea [2000] *OJ L*161/1.

141 Koskeniemi, fn 87 above, p 32; Wessel, fn 82 above, p 179.

142 See Krenzler and Schneider, fn 95 above, p 139.

143 See Whitman, fn 132 above; Eeckhout, fn 47 above, p 153; and Wessel, R, 'The inside looking out: consistency and delimitation in EU external relations' [2000] 37 *CMLRev* 1148-9, p 1155). For example, the Common Position on Africa 'notes that the Commission intends to direct its action towards achieving the objectives and priorities of this Common Position, where appropriate by pertinent Community measures' (Article 13 of Common Position).

144 This does not detract from the controversial argument made above regarding the potential theoretical implication of the unsettled question of hierarchy between security and development.

pertinently discussed.

5.3.2. CFSP Joint Actions and coherence: between long term measures and *ad hoc* diplomacy

CFSP Joint actions are also directed to the Member States and commits them in the positions they adopt and in the conduct of their activity.¹⁴⁵ It is therefore mainly an instrument for vertical coherence between the EU and Member States.¹⁴⁶ However, this does not mean that it ignores the requirement of coherence between EU external policies, especially between the CFSP and non-CFSP dimensions of EU security policy.¹⁴⁷ Indeed, similar to Common Positions, Joint Actions usually refer to the requirement of coherence across EU policies including with the institutional responsibility in that regard.¹⁴⁸ Effectively, the instruments often highlight in principle the complementarity and required synergy between the CFSP and non-CFSP competences. But of course, as the *ECOWAS* case illustrates, the formal recognition of the need for coherence and the relevant institutional responsibility in the instruments is not always supported with productive institutional dialogue for effective coordination in practice.¹⁴⁹

¹⁴⁵Article 28 TEU (ex-Article 14 TEU as amended). They are directed at the Member States which they bind in principle. However see Chapter Six of this thesis.

¹⁴⁶An issue outside the scope of this thesis.

¹⁴⁷See for example, Article 9 Council Joint Action 2002/589/CFSP on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP [2002] *OJ L*191/1; and also Article 4(2) Council Decision 2004/833/CFSP implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons [2004] *OJ L*359/65.

¹⁴⁸For example, the *ECOWAS* Joint Action provides that '[...] the Council and the Commission shall be responsible for the consistency of the Union's activities in the field of small arms [...]' (Article 9). In the same vein, the annulled Council decision implementing the *ECOWAS* Joint Action provides that '[...] The Presidency and the Commission shall submit to the relevant Council bodies regular reports on the consistency of the European Union's activities in the field of small arms and light weapons, *in particular with regard to its development policies*, in accordance with Article 9(1) of Joint Action 2002/589/CFSP' (Article 4(2)) Council decisions implementing *ECOWAS* Joint Action).

¹⁴⁹Case *C-91/05 (ECOWAS)*, fn 90 above. In this case the Commission contested the Joint Action on Small Arms in relations to ECOWAS (see fn 147 above) along with Council Decision 2004/833/CFSP which implements it (see fn 147 above). The control and elimination of illicit trade in small arms and light weapons is one of the conflict prevention measures identified in the Common Position for Africa (see Article 7, Common Position for Conflict Prevention in Africa, fn 127 above). The Common Position was to be conducted at both the regional (African Union) level and sub-regional levels (see Annex II attached to this thesis) pursuant to Article 4 of the Common

In any event, the similarity between Joint Action and the Common Position does not blur the distinction between the two. Joint Action is more action-oriented and specifically targeted.¹⁵⁰ For example, in the context of EU external action towards SSA, the Common Position defines the general approach of the EU to the relevant themes and the region. Contrastingly, the actionable measures to achieve concrete aims in this regard are often laid out in Joint Actions. Illustrative for example, is the Joint Action on Small Arms¹⁵¹ which was challenged in the *ECOWAS* case.¹⁵² However, beyond this type of long term actionable technical and financial support, Joint Action is also relied on for *ad hoc* measures of conflict prevention. While this would mostly be the case for CSDP operations,¹⁵³ it is also the case for active preventive diplomacy under the CFSP. With regards to the latter, the EU may for example, deploy a specially appointed European Union Special Representative (EUSR)¹⁵⁴ for meditative shuttle

Position (also see Preamble, para 2 of same). The issue of small arms is a typical example of an issue which lies at the heart of the nexus between development policy and security policy especially in the context of EU external action in SSA. Measures to combat small arms could rightly be pursued from both under the non-CFSP development cooperation, and the security policy under the CFSP framework. In this regard, it is noteworthy that contrary to the Commission's position that the control and elimination of small arms and light weapons falls under development policy, the ECJ only annulled the contested CFSP measure for its own defects namely its link to sustainable development both in its aim and content (Case *C-91/05 (ECOWAS)*, paras 96-99, and 107-109); also see Council Decision 2004/833/CFSP recital 1 on the reference to sustainable development as an objective albeit along with peace and security; and Article 8 and 9 of Council Joint Action 2002/589/CFSP which the ECJ also referred to in reaching a decision that the Council Decision was a development measure adopted on a wrong legal basis (CFSP) and hence should be annulled for infringement of ex-Article 47 TEU in that it should have been adopted under the ex-Community legal basis: '[...] For, according to settled case-law, the legal basis for an act must be determined having regard to its own aim and content [...] (see to that effect, Case *C-94/03 Commission v Council*, paragraph 50)' (para 106)). However, the Court considered unnecessary an examination of 'the pleas as to the alleged illegality of the Joint Action' (Case *C-91/05 (ECOWAS)*, fn 90 above, at para 111). It is not clear why the Court preserved the Joint Action. However, what is clear is that the objective of the Joint Action is not expressly linked to development. Furthermore, it is arguable that the Joint Action was treated as a policy document of general guideline aimed at the EU as a whole. In this regard, it was to be implemented through both the CFSP and non-CFSP institutional competences similar to the Common Position discussed above. In fact, the ECJ expressly recognised that the objectives of the Joint Action could be pursued both under the CFSP and the non-CFSP competences (Case *C-91/05 (ECOWAS)*, at paras 84-88). It is arguable that the import of this point is lost in the post-Lisbon deletion of the provision which allowed for the implementing of this type of CFSP decisions with a non-CFSP measure. Nevertheless, this does not detract from the fact that the duality of the procedures and instruments of EU external security policy was upheld. However, this was not done without recognition of the need for coherence between the two aspects, and the institutional responsibility in that regard.

¹⁵⁰This is in contrast to the mainly declaratory and guideline nature of the Common Position.

¹⁵¹ See Council Joint Action 2002/589/CFSP, fn 147 above.

¹⁵² See fn 90 above.

¹⁵³ See Chapter Six of this thesis.

¹⁵⁴ See Article 33 TEU; for a good list of some relevant Joint Actions see Ambos, A, 'The Institutionalisation of

diplomacy¹⁵⁵ as will now be discussed in the institutional analysis.

5.4. The institutional dimension of the conduct of CFSP with a special focus on diplomacy

Similar to the related sections in the previous Chapters, this section enunciates the role of the relevant EU institutions in decision making, implementation and enforcement of the CFSP with a view to determining coherence including policy coherence for development, and coherence *vis-a-vis* synergy in the sequencing of policies. The latter specifically focuses on CFSP diplomacy as indicated above. In doing this, highlight is placed on the roles of the HR/VP and the EEAS – acceptably the institutional bridges between the Council and the Commission which respectively represent the key players in the CFSP and non-CFSP external action as discussed in Chapter Two of this thesis. Invariably, it has to be remembered that the complex dynamics of EU external action in general is often ameliorated with institutional flexibility and pragmatism in practice.¹⁵⁶ Indeed, it is arguable that this would be more so in the complex context of the legalised high politics of the CFSP as discussed above,¹⁵⁷ and in the light of the

CFSP and ESDP' in Reynolds, C, *et al*, (eds.) *EU Foreign Policy: from Rhetoric to Reality* (Brussels, PIE, 2004), p 174. However, see with regards to the post-Lisbon umbrella term of 'decisions', Council Decision 2013/133/CFSP of 18 March 2013 appointing the European Union Special Representatives for the Sahel *OJ L75/29* (hereinafter EUSR for the Sahel).

¹⁵⁵ Shuttle diplomacy is the process of serving as an intermediary between parties in a dispute (see for example Lenczowski, G, *American Presidents and the Middle East* (Duke University Press: 1990), p 131). This is a continuation of the active diplomacy of the EPC era which included the active sending of observers and mediators into areas of conflict (see 5.2.3. above). However, the role of EUSR is not limited to this. Some are also appointed to provide a political backing to a CSDP operation. Although, the substance of the mandate of an EUSR depends on the political context of the deployment, the mandate is often coded in a Joint Action. Other forms of EU representative role include representations that can be handled either by the Commission, the Presidency, the 'tandem' formula (also known as the 'bicephalous' Presidency), or the 'Troika' formula (see Smith, M, 'The quest for coherence: institutional dilemmas of External Action from Maastricht to Amsterdam' in Sweet, A, *et al*, (ed.) *The Institutionalisation of Europe* (OUP, 2001), p 178).

¹⁵⁶ See Chapter Two of this thesis (at 2.5.3.); and also the analysis of the institutional dimension of development policy and trade policy (as discussed in Chapters Four and Five respectively).

¹⁵⁷ See Chapter Two of this at 2.1.

security development interface.¹⁵⁸

5.4.1. CFSP decision making: between the Council and the HR/VP¹⁵⁹

CFSP proposals originated from the Commission and the Member States in the pre-Lisbon era.¹⁶⁰ However, post-Lisbon, they may originate from any Member State, the HR/VP, or the HR/VP with the Commission's support.¹⁶¹

Effectively, the Commission was stripped of any independent power of initiative under the CFSP at Lisbon. However, this may have little or no implications for coherence.¹⁶² Arguably, the role of the HR/VP as a Vice President of the Commission could potentially remedy any effect of the perceived disjunction from the Commission at Lisbon.¹⁶³ Moreover, as discussed above,¹⁶⁴ the Commission and the EEAS are already working together under development

158Indeed, although the Sahel Strategy arguably leans more towards security in its attempt to conflate EU security and development strategies, there is no express indication of its legal basis in the Treaties (for the relationship between legal basis and institutional procedure, see Chapter Two of this thesis at 2.3.3. above).

159In so far as the CFSP is mainly intergovernmental in approach, there is no need to distinguish between the Council and the Member States for the purposes of decision-making under the CFSP. Furthermore, as indicated in Chapter Two, since the European Council assumes the overarching role of defining the strategies and objectives of EU external action in general, it is not necessary to investigate how it does this in relation to the specific policies.

160Except for matters of urgency when it also fell within the remit of the Council Presidency (ex-Article 22 TEU).

161Except in matters of urgency in which the HR/VP of her own motion or at the request of a Member State may convene Council meeting pursuant to Article 30 TEU (ex-Article 22 TEU as amended).

162This is not to say that it will not affect the Commission's traditional influence in shaping EU-Africa policies (see Sicurelli, D, *The European Union's Africa policies: Norms, Interests, Impacts* (Farnham: Ashgate, 2010), p 217-234; and Hewitt, A, and Whiteman, K, 'The Commission and development policy: bureaucratic politics in EU aid – from the Lomé leap forward to the difficulties of adapting to the twenty-first century' in Arts and Dickson, fn 90 above, p 133); and also Joint Communication to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, (COM(2011)331 of 08 March 2011. This may be hard for the Commission which have a much longer presence in SSA than any other EU institution.

163However, it is noteworthy that her position as the Vice President of the Commission does not mean that the HR/VP is representing the Commission in the Council. As explained in Chapter Two (at 2.5.3.5.), the HR/VP is only bound by Commission procedure only when he or she is exercising her Commission-related responsibilities (Article 18 (4) TEU); also see Erkelens, L, and Blockmans, S, 'Setting up the European External Action Service: An institutional act of balance', *CLEER Working Papers* 2012/1, pp 9, 13 and 31 where they suggest that the HR/VP is in practice marginalised in the Commission and arguably has accepted to act according to the mandate provided to her by the Commission President despite the provisions of the Treaties.

164At 5.3.2. above; and also in Chapter Three (at 3.4.2.1).

policy. In any event,¹⁶⁵ it is arguable that the work of the HR/VP (and the EEAS) under the CFSP could be considered automatically coherent with development policy in the light of the intense nexus between security and development.¹⁶⁶

The CFSP decision-making rests on the Council by virtue of Article 26(2) TEU.¹⁶⁷ Similar to other fields of external action, the Council is supported in CFSP policy making by the Council preparatory bodies¹⁶⁸ including Working Groups and Special Committees as well as the Council General Secretariat. In contrast to ACP Working Group for development policy and Article 113 Committee for trade policy,¹⁶⁹ the specific Council working Group for EU external action towards SSA under the CFSP framework is the Africa Working Party (COAFR).¹⁷⁰ This remains

165Including whether the requirement of policy coherence in relation to the CSFP is accepted as a *façon de parler* or not.

166Of course, this is in any event different from the question for overall coherence of EU external action *vis-à-vis* institutional coordination and synergy in the sequencing of available policy options (see 5.5. below and also Chapter Eight of this thesis in general).

167Pre-Lisbon, the Commission was 'fully associated' to the CFSP (by virtue of ex-Article 18(4) TEU) and even attended the meetings of the different Council Working Groups and configurations of the Council (as the 29th Member State as discussed in Chapter Two at 2.5.3.3.). Whether this remains the case post-Lisbon has not been established. This is in contrast to the association of the European Parliament (EP) in the CFSP which never participated in the CFSP decision-making but has nevertheless been able to influence the CFSP on critical occasions through its reports, debates and budgetary powers (Van Vooren and Wessel, fn 16 above, p 376). Post-Lisbon, the EP may ask questions and make recommendations to the Council and to the HR/VP pursuant to Article 36 TEU (ex-Article 21 TEU). In this regard, the HR/VP shall also consult the EP on the main aspects of and basic choices of the CFSP and inform it on how those policies evolve, as well as take its views into consideration. There is no indication of what is meant by 'main aspects and basic choices'. However, according to Van Vooren and Wessel (fn 16 above), the EP's influence is limited to the general guidelines as opposed to concrete decisions (p 376). Furthermore, it has been suggested that the fact that the EP shall only be informed 'on how those policies evolve' would seem to indicate that this is not at the stage of decision-making but rather as a matter of regular but *a posteriori* briefing (see European Parliament Report on the Annual Report from the Council to the European Parliament on the main aspects and basic choices of CFSP including the financial implications for the general budget of the European Communities, 2003, para 2). In general, although the EP (which can debate on the CFSP twice a year) can express its views on coherence as it relates to the CFSP, this can only be done after the fact.

168For a list of the post-Lisbon Council preparatory bodies see Council of the European Union, Doc. 11903/11, Brussels, 22 June 2011.

169See respectively Chapter Three of this thesis (at 3.4. above) and Chapter Four (at 4.4.).

170This was from an earlier research in 2011 (COAFR is the French acronym for this geographical and thematic (CFSP) Council Working Group (see www.se2009.eu/en/meetings_news/2009/7/8/africa_working_party_coafr.html, accessed December 29, 2011). However, according to the Council's website, COAFR is 'responsible for the management of EU external policy towards SSA sub-Saharan Africa, including its 46 countries, the African Union and other sub-regional organisations' (<http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/africa-working-party/>, accessed 27 February 2016).

the case post as pre-Lisbon.¹⁷¹

Post-Lisbon, COAFR is attached to the EEAS Africa Desk, however where its preparatory work goes to *en route* to the Council is not certain. For example, as explained earlier, the Committee of Permanent Representatives (COREPER)¹⁷² is the highest Council Committee. However, the CFSP falls under the remit of both COREPER and the Political and Security Committee (PSC).¹⁷³ The latter ‘shall monitor the international situation in the areas covered by the [CFSP] and contribute to the definition of policies by delivering opinions to the Council’ without prejudice to the competence of COREPER under Article 240 TFEU.¹⁷⁴ Although the role of the PSC is arguably more pronounced in the context of CSDP crisis management,¹⁷⁵ this does not detract from the fact that its role in the non-CSDP foreign and security policy renders the question of the highest Council Committee for the CFSP a question that cannot be concluded with certainty. Indeed, although the relationship between the two in the CSDP framework is discussed elsewhere,¹⁷⁶ the relationship between the two in the non-CSDP CFSP is free from controversy. For example, Van Vooren and Wessel state that the relevant Working Groups report to the PSC on all CFSP matters.¹⁷⁷ Contrastingly, De Baere makes reference to a 1992 working arrangement between the PSC¹⁷⁸ and COREPER. Under this, the former focuses on substance

171Even though it may not always be concluded with certainty the institutional dynamics at play (especially in the light of the evolving use of comprehensive instruments; also see the reference to institutional flexibility and pragmatism in practice above; and for example Council of the European Union, 'Note from the General Secretariat of the Council to Delegations' on the Council conclusions on the Sahel Regional Action Plan 2015-2020), Brussels, 20 April 2015 (OR. en) where many preparatory bodies were mentioned including COAFR, ACP Working Group, CFSP/PESC amongst others).

172Article 16(7) TEU: ‘A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council’; also see Article 240 TFEU; Article 19(1) Rules of Procedure of the Council attached to the Council Decision adopting the Council Rules of Procedure (2009/937/EU) (2009) *OJ L* 325/35; and Chapters Three and Four of this thesis.

173Article 35 TEU (ex-Article 25 TEU).

174Ibid.

175See Chapter Six of this thesis (at 6.4.1.).

176Ibid.

177Van Vooren and Wessel, fn 16 above, p 372.

178Then PoCo.

and political analysis while the latter looks at the institutional, legal, financial, and non-CFSP aspects of the questions on the table, refraining from altering or editing the opinion of its PSC colleagues.¹⁷⁹ Effectively, it could be 'speculated' that COREPER would be involved in preparatory work on general guidelines and long term declaratory instruments of the CFSP.¹⁸⁰ This will not stop the PSC from acting when necessary for *ad hoc* urgent CFSP measures.¹⁸¹ Thus, each route could still aid coherence if well utilised. However, as the Mali case study illustrates, the urgent *ad hoc* CFSP measures are not always distinctly employed.¹⁸² This could be due to the dearth of resources.¹⁸³ It could also be due to the hesitation of Member States which together share the responsibility for putting the CFSP into effect with the HR/VP, using national and Union resources.¹⁸⁴ The latter¹⁸⁵ could be justified by the former, and the former could be justified in the light of the security-development nexus which arguably reduces policy coherence for development to a *façon de parler* in relation to the CFSP.¹⁸⁶

In any event, whether through COREPER or the PSC, the CFSP proposal gets to the Council for decision-making purposes pursuant to Article 26 TEU. The relevant Council configuration

¹⁷⁹De Baere, fn 42 above, p 133.

¹⁸⁰Such as those relating to conflict prevention discussed above.

¹⁸¹However, by virtue of Article 30(2) TEU (ex-Article 22(2) TEU), the HR/VP could go direct to the Council in cases requiring a rapid decision.

¹⁸²It appears to be used more under the CSDP crisis operations.

¹⁸³For example, the CFSP budget is small and there is a limit to the extent to which it can be spent on African projects (see House of Lords Report, at fn 48 above). In this regard it may be easier for the EU to devise the long term comprehensive security and development strategies as these can draw from development funds primarily for security measures secondarily aimed at promoting development.

¹⁸⁴Article 26(3) TEU (ex-Article 13 TEU as amended). The responsibility for taking the decisions required for *ad hoc* CFSP measures of conflict prevention also lies on the Member State (Article 30(2) TEU (ex-Article 22(2) TEU as amended).

¹⁸⁵Especially if untainted by the historical factors discussed in Chapter Three (at 2.2.3.); also see 5.5.2. below.

¹⁸⁶This would be more the case were COREPER certainly excluded from the CFSP even though it is specifically tasked with ensuring policy coherence for development (see Chapter Three at 2.5.3.2.). It is noteworthy that in contrast to the PSC which is chaired by a member of the EEAS representing the HR/VP, COREPER is not chaired by a representative of the HR/VP but remains under the Chair of the rotating Presidency (see Council of the European Union, Doc. 11903/11, Brussels, 22 June 2011, Annex III). However, as mentioned above, the view that security is a precondition for development is not a commonly shared one (see p 229 above especially at it relates to fn 105 above).

in this regard would be the Foreign Affairs Council (FAC).¹⁸⁷ As discussed above,¹⁸⁸ this is the post-Lisbon Council configuration for EU external action in general.¹⁸⁹ Arguably, this would provide a good opportunity to enhance coherence between the CFSP and the non-CFSP external action. This is more so when FAC is chaired by the HR/VP.¹⁹⁰ The EEAS supports the HR/VP in her capacity as the President of FAC ‘without prejudice to the normal tasks of the General Secretariat of the Council’ (GSC).¹⁹¹ It is not clear what is meant by the ‘normal tasks’ of the GSC.¹⁹² In any event, it is not difficult to decipher that whatever influence the HR/VP and the EEAS may wield would ultimately depend on the political will of the Council which is the decision-maker.¹⁹³ The Council adopts the CFSP decisions by unanimity,¹⁹⁴ which of course would not always be easy to arrive at. Indeed, in addition to the uncertain role of COREPER in the CFSP and the fact that it is not Chaired by a representative of the HR/VP,¹⁹⁵ the HR/VP and the EEAS have mainly been using the comprehensive security and development instruments as their policy manual as of course would have been approved by the Council. As indicated above,

187Article 16(6) TEU. Prior to Lisbon, the Commission would usually sit as the 29th Member State in the Council (see 2.5.3.3.). Whether this remains the case post-Lisbon has not been established.

188In Chapter Two (at 2.5.3.2.).

189Pursuant to Article 16(6) TEU. It has been suggested that it is the General Affairs Council (GAC) which prepares the strategic CFSP guidelines since the GAC and not the FAC that prepares and ensures the follow-up of the work of the European Council pursuant to Article 16(6) TEU (see for example, Erkelens and Blockmans, fn 163 above, p 12). However, this is discussed in relation to the JAES in Chapter Seven of this thesis.

190Indeed although her Chair position is not tantamount to membership of the Council for decision-making purposes, her FAC Chair position still creates a potential avenue for the HR/VP to enhance the unity and coherence of EU external action with the Council pursuant to Article 26(2) TEU (ex-Article 13(3) TEU as amended). Of course, this may only be with persuasive reminders to the latter (see Erkelens and Blockmans, fn 163above, p 13 where it is rightly argued that the HR/VP is not a member of the Council, and accordingly does not play any part in the Council’s decision-making). She also cannot enforce (see 4.3. below).

191EEAS Decision, recital paragraph 3 and Article 2(1).

192However, Hayes-Renshaw and Wallace suggest that it ‘may [...] be interpreted narrowly as the normal tasks of technical and logistical assistance expected of the usual sort of secretarial support bodies. Alternatively, they may be interpreted widely, to include all aspects of assistance, be they technical, logistical, advisory or even mediatory [...]’. In any event, the narrow interpretation [...] is ruled out by the rather peculiar nature of the Council [...]’ (Hayes-Renshaw, F, and Wallace, H, *The Council of Ministers* (Basingstoke: Macmillan, 1996), at p 119-120).

193For example, in relation to policy coherence for development, were the Council of the opinion that security is a precondition for development, this would render the question of policy coherence a *façon de parler* as controversially theorised in this thesis.

194Article 30 TEU.

195See the previous page.

this is a different path from the development programming discussed in Chapter Three.¹⁹⁶ In this regard, it can be argued that although the post-Lisbon legal changes and the introduction of the HR/VP and the EEAS in her service are positive developments with the potentials of enhancing coherence between EU external policies, the inextricable nexus between security and development means that their responsibility towards policy coherence for development would arguably be discharged simply by virtue of their work under the CFSP.¹⁹⁷

5.4.2. CFSP implementation¹⁹⁸ with special reference to SSA: between the HR/VP, the EEAS and the Member States

In contrast to the pre-Lisbon dispensation,¹⁹⁹ the post-Lisbon Treaties provide that the HR/VP shall conduct the CFSP²⁰⁰ and ensure the implementation of decisions adopted by the European Council and the Council.²⁰¹ The HR/VP also shares the responsibility for putting the CFSP into effect with the Member States, using national and Union resources.²⁰² It is not clear what the different roles of the HR/VP specifically entail in detail.²⁰³ However, it is clear that she implements the CFSP with the support of the EEAS which is tasked with supporting the HR/VP in fulfilling her mandate.²⁰⁴

¹⁹⁶See Chapter Three of this thesis at 3.4.2.1.

¹⁹⁷As discussed in Chapter Two of this thesis (at 2.5.2), policy coherence entails the need for other EU policies to be shaped so that they do not undermine and where possible contribute to realising development objectives. As discussed in Chapter Four (at 4.4.), the HR/VP and the EEAS are excluded from trade policy.

¹⁹⁸It is noteworthy that the distinction between CFSP policy-making and implementation is not always clear.

¹⁹⁹The implementation of CFSP acts and decisions was the responsibility of the Presidency by virtue of ex-Article 18(2) TEU (see for example the annulled Council Decision 2004/833/CFSP or the ECOWAS decision, at fn 147 above). The Presidency was assisted in this task by the Secretary General of the Council (ex-Article 18(3) TEU) which was also the High Representative for Common Foreign and Security Policy (HRCFSP). This is not to say that the Commission was completely excluded from implementing CFSP measures (it was 'fully associated in the CFSP tasks by virtue of ex-Article 18(4) TEU (see p 247 above and also the ECOWAS Decisions discussed at fn 147 above).

²⁰⁰Article 18 TEU.

²⁰¹Article 27(1) TEU.

²⁰²Article 26(3) TEU.

²⁰³For example, it is not clear what the difference is between 'conduct', 'implement' and 'put into effect' especially since the HR/VP is not a decision-maker.

²⁰⁴See the EEAS organisational chart for the relevant EEAS African desks managed by Nicolas Westcott

Of course, as mentioned above, the limited formal competences of the Commission in the CFSP area have not led to the Commission being completely passive in this area. For example, Van Vooren and Wessel explain that while the Commission's role in the implementation of the CFSP is formally non-existent,²⁰⁵ practice from the outset nevertheless showed an involvement of the Commission in the implementation of CFSP decisions.²⁰⁶ This they further explain is not least because other measures were in some cases essential for effective implementation of CFSP policy decisions.²⁰⁷ While there is an indication that the Commission would rather implement security policy measures it adopts under the non-CFSP external action than implement them as CFSP measures in the pre-Lisbon era,²⁰⁸ the post-Lisbon comprehensive instruments have arguably led to a blend that calls for the EEAS and the Commission to work together in the context of the comprehensive security and development instruments. Illustrative is the Sahel Strategy. However, the blend has to be placed in context in the light of the fact that the comprehensive instruments are not intended to mix all the policies into one *minestrone*.²⁰⁹ Furthermore, as the Mali case study illustrates, the Sahel Strategy was not mentioned in the 'comprehensive' development programming instrument for Mali which the EEAS also prepares jointly with the Commission.²¹⁰ In general, the roles of the EEAS and the Commission in implementing the CFSP will centre mainly on technical and financial assistance in accordance with the provisions of legal CFSP instruments such as the common position on conflict

(available at http://eeas.europa.eu/background/docs/organisation_en.pdf, accessed 12 February 2016).

²⁰⁵Van Vooren and Wessel, fn 16 above, p 375. This is because the delegation of executive competences from the Commission is prevented by the fact that CFSP acts are not legislative acts (Article 29 TFEU).

²⁰⁶Van Vooren and Wessel, fn 16 above, p 375.

²⁰⁷*Ibid.*

²⁰⁸Based on the question of using the correct legal basis (see for example the *ECOWAS* case fn 90 above).

²⁰⁹The comprehensive instruments still de-compartmentalise the policies but only tries to facilitate synergies and timely sequencing between them. Indeed, as explained in Chapter Two, the HR/VP and the EEAS does not replace the traditional institutions but are actually to function as bridges between them with the aim of enhancing if not ensuring coherence. Of course, this does not explain the Sahel Strategy which the Commission was actively engaged in its evolution, but its final document that emerged post-Lisbon expressly originated from the EEAS.

²¹⁰See further the Mali case study at 5.5. below. In fact, the relationship between the two 'comprehensive' instruments is not clear.

prevention in Africa and the annulled *ECOWAS* decision discussed above, as well as the comprehensive instruments. To assist them in this regard is the EU Delegations which does not only analyse the local situations but also implements EU foreign policy²¹¹ and conduct political dialogue.²¹²

Apart from the EEAS and the Commission with the EU Delegation in their support, the HR/VP can also avail herself of the use of a EUSR in the implementation of the CFSP. EUSRs supports the work of the HR/VP in troubled regions and countries and acting as the 'voice and face of the Union, play an active political role in efforts to consolidate peace, stability and the rule of law. They are therefore relevant for enhancing coherence especially as they could be quickly deployed for active preventive diplomacy and mediation to forestall the break out of violent conflicts. Certainly, this is not to say that their deployment is a guarantee that a crisis would be averted. However, in the context of this study, the focus is not necessarily on the end result of EU policies but whether the EU has adhered to the standard or requirement it set for itself regarding the coherence of its external action. In this regard, where necessary the appointment of EUSR could have a synergistic effect in the sequencing of available policy options in situations of instability. However, since the appointment of a EUSR is done with the use of the legal instrument formally known as Joint Action,²¹³ the final decision to appoint one does not fall under the remit of the HR/VP and depends completely on the Member States.²¹⁴ Her power in this regard ends with convening an extraordinary meeting of the Council either of her own

211See Chapter Two of this thesis at 2.5.2.6.).

212See Délégation de l'Union européenne en République du Mali, available at http://eeas.europa.eu/delegations/mali/about_us/delegation_role/index_fr.htm, accessed 12 January 2016). Arguably, this would mainly be at the level of civil society as there are other higher institutions of the EU for political dialogue.

213See above.

214Arguably, this is decision-making cum implementation.

motion, or at the behest of a Member State in matters of urgency.²¹⁵ Arguably, this therefore does not make a significant change to the pre-Lisbon era when convening for urgent matters fell under the remit of Council Presidency.²¹⁶ As the Mali case study illustrates, an appointment may cover a sub-region rather than a specific country depending on the dimension of the conflict or as tied to a comprehensive instrument.²¹⁷

5.4.3. Institutions and enforcement

The major roles of the ECJ in the field of EU external action have been mentioned above.²¹⁸ With specific regards to the CFSP, Article 24(1) TEU and Article 275 TFEU rule out the Court's jurisdiction as regards this field of EU external policy.²¹⁹ In this regard, although the Court has jurisdiction over Article 40 TEU²²⁰ on the mutual protection of the CFSP and non-CFSP external action so that each does not affect the procedures and the extent of the powers of the institutions of the other, there is no form of legal enforcement in relation to the CFSP in general.

215Within 48 hours or shorter period (Article 30(2) TEU (ex-Article 22(2) TEU as amended)).

216The Presidency, of its own motion, or at the request of the Commission or a Member State (ex-Article 22(2) TEU).

217See 5.5. below.

218See for example, 4.4.4. above.

219Except as regards sanctions on individuals or 'legal base' arguments (see Article 275 TFEU). The exclusion of the ECJ is not new and started from the onset (Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023). Of course, as discussed in Chapter Two, the Member States had always wanted the CFSP to be shielded from what some perceived as 'judicial activism' (see for example Van Vooren and Wessel, fn 16 above, p 376; and also see to this effect the reference to the role of the Court in the expansion of the scope of EU external policy competence in Chapter Two of this thesis). In fact, pre-Lisbon, CFSP decisions were considered international law decisions (see for example, Case C-203/07, *Greece v Commission* [2007] OJ L155/10, para 62: 'The provisions of [Title V of the EU Treaty] give rise to rights and obligations governed by international law'; also see Denza, fn 77 above, p 55; and Bono, fn 48 above, p 364; Krenzler and Schneider fn 95 above, p 147; Wessel, fn 84 above, p 154-155; Macleod, I, *et al*, *The External Relations of the European Communities* (Oxford: Clarendon Place, 1996), p 418). The legal implications of the Joint Action as an international law decisions has never been fully explored, and it is doubtful that an internal EU matter will be subjected to external judicial review or enforcement. In any event, it is arguable that the consideration of CFSP decisions as international law decision applied in the context of the traditional distinction between the ex-Community law and the intergovernmental areas, and is therefore no longer tenable in light of the Lisbon changes and the evolution of EU law to absorb what used to be Community law. Indeed, it is arguable that once a decision is made under this EU instrument, it becomes EU decision and no longer the decision of the Member States.

220Ex-Article 47 TEU as amended.

However, it is noteworthy that the Court recently asserted a wider jurisdiction over the CFSP, arguing that the rule in the Treaty was its ‘general jurisdiction’, and so Article 275 TFEU was a ‘derogation’ which had to be ‘interpreted narrowly’.²²¹ The Court argued that it did have jurisdiction to consider issues of procedure as distinct from substance.²²² It is doubtful whether this would extend to the requirement of coherence which already is beleaguered with the unsettled question of the Court's potential jurisdiction and issues bordering on enforceability.²²³ Certainly, this is a further limitation to the other weak institutional provisions regarding the requirement of coherence. Indeed, although the Council, the HR/VP and the Commission are tasked with the responsibility for ensuring the overall coherence of EU external action in general, it is clear that the Commission do not ‘guard’ the CFSP as it does the non-CFSP competences and the Treaties in general.²²⁴ Furthermore, similar to other areas of external action, the HR/VP and the EEAS in her service do not have any monitoring or enforcement powers in the CFSP not to talk of an independent power to regulate the Council which is also the Member States in this context. In general, as discussed above,²²⁵ the nature of the CFSP means that Member States are not obliged to adopt decisions or to act.²²⁶

221See Case C-658/11 *European Parliament v Council of the European Union*, Judgment of the Court (Grand Chamber) of 24 June 2014.

222The reason being that the procedural legal basis for CFSP treaties is Article 218 TFEU - a provision outside the scope of the CFSP rules as such (Peers, S, ‘The CJEU ensures basic democratic and judicial accountability of the EU’s foreign policy’, *EU Law Analysis*, 24 June, 2014, available at <http://eulawanalysis.blogspot.co.uk/2014/06/the-cjeu-ensures-basic-democratic-and.html>, accessed 15 October, 2015).

223See Chapter Two of this thesis at 2.5.2.4.).

224See Chapter Two of this thesis at 2.5.3.3. above. Although the European Parliament is not excluded from enhancing the coherence of EU external action, its influence on the CFSP is equally limited as discussed above (see fn 167 above).

225At 5.1.

226With specific regards to the requirement of policy coherence for development, as discussed above, there may be a liberty to construe security measures as development measures in the light of the intense nexus between security and development. Hence rendering the question of policy coherence for development with regards to the CFSP a *façon de parler*.

5.5. CFSP preventive diplomacy and Mali in the light of the country's recent crisis: a case study

On the back of the framework of the CFSP discussed above, this section discusses Mali as a case study for the conduct of the CFSP in SSA with a view to determining the overall coherence across EU policies.²²⁷ It is noteworthy that this is unavoidably a short case study.²²⁸ This is not only because of the inextricable nexus between security and development, but also because the crisis in Mali and the security situation in the country is a most recent development without a long history that is different from the general development situation of the country as discussed earlier.²²⁹ However, apart from these, it is arguable that the beginning and progression of the Mali crisis may not have left enough room for *ad hoc* EU preventive diplomatic measures under the CFSP framework. Perhaps, the crisis evolved quickly towards the level of violent crisis requiring measures under the CSDP instead.²³⁰ Nevertheless, this does not reduce the relevance of the discussion of the CFSP with a special focus on preventive diplomatic measures to the determination of coherence of EU external action towards SSA.

²²⁷ Ibid.

²²⁸ That is in comparison to the case study in the last two Chapters.

²²⁹ Mali's development index and EU development policy towards the country was extensively discussed in Chapter Three. However, it would be recalled from Chapter One of this thesis (at 1.1.) that the history of Mali's instability is mired in controversy with one view considering the country as one with a history of stability, while a contrasting view considers the country as one that has been repeatedly subjected to political, economic and ecological turmoil since independence. In any event, it is noteworthy that a recent empirical research reveals that the EU was seen firmly as a non-political donor mainly involved in managing development projects, including with state actors, but not engaging in political discussions or on questions related to conflict or security prior to the crisis (Davis, L, 'Reform or Business as Usual? EU Security Provision in Complex Contexts: Mali' (2015) 29 *Global Society* 2, 260-279, at 266).

²³⁰ See Chapter Six of this thesis at 6.5. Of course, there is a difficulty with using this as a case study for the determination of coherence in EU external action towards SSA *vis-à-vis* the construction of a united whole based on synergy in the sequencing of the policy options available to resolve a crisis. This is because the speed of progression of crisis is not always the same. In general, as acknowledged in Chapter One of this thesis (at 1.6.), while the country case study of Mali makes for manageability, the attendant limitations cannot be denied in so far as there are as much differences as similarities in the countries of SSA. Same would apply to the progression of crisis which would always depend on the context of each crisis.

5.5.1. The Mali crisis in context

Although it is possible that the Mali crisis could be traced back to some historical or political factors that may have occurred in Mali years before eruption of the recent outbreak of conflict, these are outside the limited scope of this analysis. Rather, the analysis focuses on the immediate background to the current crisis which in any event cannot be separated from the general fragility of the Sahel.²³¹ Generally marked by poverty and fragility, the entire Sahel region has in recent times been struck by a severe multi-dimensional crisis and volatility reportedly exacerbated by the region's location as an uncontrolled passageway between the troubled Maghreb in the north and the piracy-afflicted Gulf of Benin in the South.²³² The Sahel Strategy was a response to these challenges and a host of others which had security implications not only for the people of the region but also for Europe and Europeans due to the geographical proximity of Europe to the region.²³³ Although the Sahel Strategy is the key framework for EU action at both individual and collective levels to help countries in the wider Sahel-Saharan region address key security and development challenges, Mali's recent crisis has placed that country at the centre of EU action in the Sahel.²³⁴ However, while the Strategy responds directly to some of the long-term causes of conflict in Mali and the broader region, it could not forestall the

231As discussed earlier (in Chapter One of this thesis at 1.2. above), the Sahel Strategy is the key framework for EU action at both individual and collective levels to help countries in the wider Sahel-Saharan region, including Mali, address key security and development challenges.

232Ibid.

233Ibid. Suffice it to state that the EU and its Member States have vested interests in the region's progress and stability. As could be gleaned from the Sahel Strategy, the EU had been advocating a 'comprehensive security and development approach to respond to the complexity of the challenges in the Sahel since 2008. The Sahel Strategy was the final outcome as it emerged from the EEAS in 2011: "The EU has been advocating a comprehensive security and development approach to respond to the complexity of the challenges in the Sahel since 2008. A joint paper (14361/10) on the security and development in the Sahel was drafted by the Commission and the Council Secretariat General, following the options paper (COREU SEC 750/09 of 7 April 2009), and joint fact finding missions to Mauritania, Mali and Niger, at the political and technical level. Following the rapid and serious deterioration of the security situation in the Sahel [...], the Foreign Affairs Council of 25 October 2010 invited the High Representative to draw up, in association with the Commission, a Strategy on the Sahel, in response to which a Joint Communication by the commission and the HR was presented on 08 March 2011" (the Sahel Strategy, fn 24 above, p 2, at fn 1).

234See Chapter One of this thesis at 1.1. above; also see

eruption of the Mali crisis which could directly be traced back to the revolt of the National Movement for the Liberation of Azawad (MNLA)²³⁵ in January 2012. The MNLA cause was a clamour for self-determination and hence a separatist cause.²³⁶ Armed with a huge cache of arms left over from the Libya conflict,²³⁷ the MNLA overpowered the Malian army on many occasions. Although the self-determination cause of the MNLA sharply contrasts with the propositions of the right wing Islamist group - Al-Qaeda in the Islamic Maghreb (AQIM), the MNLA found allies in AQIM. The latter which is suspected to have links with Al Qaeda, had been causing carnage in the Northern part of Mali.²³⁸ In an ironic twist of fate, the Malian army, either out of frustration in the face of the double onslaught²³⁹ or out of sheer political ambition turned against the Malian government. A few days before the Mali presidential election in 22 March 2012, the Malian Army successfully executed a coup. This was the beginning of international involvement in the Mali conflict. The coup was broadly condemned by the international community including the Economic Community of West African States (ECOWAS),²⁴⁰ the African Union (AU),²⁴¹ the EU,²⁴² and the UN.²⁴³ With the refusal of ECOWAS and the AU to accept the legitimacy of the military junta, the latter were compelled to transfer power to an interim national government which would organise an election. However, the chaos created by the coup provided the right-wing Islamists with the opportunity

235MNLA is the French acronym with which the movement is widely known.

236In general, its members are reportedly made up of returnee rebels from Libya where they had been part of Col. Muammar Gaddafi's security forces (BBC New Africa, 20 January 2012, available at <http://www.bbc.co.uk/news/world-africa-16643507>, accessed 10 February, 2013).

237Dioura, C, and Diarra, A, 'Mali army abandons northern town after rebel attack', REUTERS, Edition: US, 31 March 2012, available at <http://www.reuters.com/article/2012/03/31/us-mali-rebels-idUSBRE82U0DG20120331>, accessed 10 February, 2013.

238The Sahel Strategy, fn 24 above (at p1).

239They had accused the government of giving them inadequate resources to fight the rebels (Ibid).

240ECOWAS Press release, N°: 074/2012, Abuja, 22 March 2012.

241AU Peace and Security Council, 316th Meeting, Communique, PSC/PR/COMM.(CCCXVI), Addis Ababa, Ethiopia, 3 April, 2012, para 4.

242European Union, 'Statement by EU High Representative Catherine Ashton on the *Coup d'etat* in Mali', A 142/12, Brussels, 22 March, 2012.

243Security Council Press Statement on Mali conflict, SC/10590 AFR 2359.

to unleash terror on a wider scale. Thus, the conflict intensified, causing further deterioration of the security situation with grave humanitarian and human rights implications. This ultimately called for peacekeeping dimension of conflict prevention²⁴⁴ over and beyond the need for long term measures and *ad hoc* preventive diplomatic measures under the CFSP framework.

On 1st September 2012, the interim government of Mali requested the assistance of ECOWAS in quelling the rebellion and in combating terrorism. Thence through successive requests by both the interim government of Mali and ECOWAS, the matter reached the UN. The requests was for an UNSC resolution authorising an international military stabilisation force to assist the armed forces of Mali acting under Chapter VII as provided by the UN Charter.²⁴⁵ On October 12, 2012, the UNSC unanimously adopted at the first instance, the UNSC Resolution 2071. This was an authorisation for ECOWAS and the AU to develop a plan for military intervention in Mali and to report back to the UNSC within 45 days.²⁴⁶ This Resolution also included a call on the international community including the EU to get involved in the resolution of the conflict in Mali.²⁴⁷

244Under the CSDP framework as discussed in Chapter Six of this thesis.

245See Security Council, Resolution S/RES/2071 (2012), adopted by the Security Council at its 6846th meeting, on 12 October 2012.

246Ibid, para 7.

247Ibid, para 9 (see further Chapter Six at 6.5.). In so far as the relevant measures required at this stage are CSDP measures, the EU's response at this stage of the crisis is discussed in Chapter Six of this thesis on the CSDP. In contrast, in line with its aim, this Chapter focuses on the EU's response under the CFSP framework between the long term measures of EU external action for conflict prevention and the peacekeeping stage of the CSDP. As discussed above, this is neither to say that a relevant CFSP measure must necessarily prevent the outbreak of a violent crisis, nor is to say that the EU is solely responsible for conflict prevention in SSA in general, or Mali in particular. On the legal implication of the relevant agreement between EU and the countries of SSA under the Cotonou Agreement, see Chapter Two of this thesis.

5.5.2. The EU's response (or lack thereof) to the Mali crisis under the CFSP framework beyond the guideline measures

Some long term instrument of EU external action towards SSA under the CFSP framework were discussed above. These are mainly general guidelines or overarching frameworks which are not targeted to any specific crisis. Essentially, they provide the basis on which further actions could be resorted to in the CFSP framework²⁴⁸ including in the light of the security-development nexus. As discussed above, the inextricable nexus between security and development could render the requirement of policy coherence for development a *façon de parler* in the context of the CFSP. However, whether CFSP measures are accepted as development measures by other means or the activities of the HR/VP and the EEAS under the CFSP framework are regarded as equating to policy coherence for development, these are different questions from whether the relevant instruments of the CFSP framework are employed synergistically in terms of the sequencing of policy options available to resolve a crisis for the construction of united whole. Undoubtedly, the achievement of the latter will also contribute to policy coherence for development in so far as it protects the ulterior intention of development policy whether development is inextricably linked to security or not.

Having said that, it is noteworthy that the usefulness of the long term instruments of the CFSP to the Mali crisis arguably ended (even if only for the time being) in March 2012 when the Mali coup was hatched and was duly condemned by the EU²⁴⁹ similar to other international organisations.²⁵⁰ Arguably, the EU had from then till September of the same year when the conflict intensified to the stage of requiring peacekeeping, to implement its *ad hoc* preventive

²⁴⁸And perhaps development policy framework of EU external action.

²⁴⁹See p 252 above.

²⁵⁰See the above analysis.

diplomacy measures under the CFSP framework. Of course, the condemnation of the coup by the HR/VP is a diplomatic foreign policy measure. But how far this goes to the heart of the prevention of a conflict is not immediately clear from a legal perspective.

In general, although the general CFSP framework instrument discussed above acknowledges the need for political dialogue and preventive diplomacy, the EU's reaction between the onset of the eruption of the Mali crisis and its full blown stage bordered on highlighting the key role of ECOWAS, AU and the UN in alleviating the crisis, and especially on a strong support to the meditative role of ECOWAS.²⁵¹ Patently, the EU could have appointed a EUSR at this stage, but it was not until March 2013 after the conflict has simmered down following *Operation Serval* by France²⁵² that an appointment of EUSR was made, and this for the Sahel region in general.²⁵³ Although it cannot be concluded with certainty that an earlier and timely appointment²⁵⁴ would have forestalled the progression of the crisis to the extent requiring military intervention, it could be deduced from the impact of the eventual appointment of the EUSR for the Sahel that the former would have been helpful even if the extent may not be known. In fact, Davies explains that the EUSR made an important contribution to the peace process and was, reportedly, able to draw on his experience and networks in the region to contribute momentum to the process and to maintain communication with key regional stakeholders.²⁵⁵ And this, despite the fact that his mandate emphasises the EU's supporting role to others in peace processes, rather than the more direct engagement envisaged for some EUSRs

251See for example Council of the European Union, Council Conclusions on Mali/Sahel, 3159th Foreign Affairs Council Meeting, Luxembourg, 23 April 2012 (Brussels, 2012); and Council of the European Union, Council Conclusions on Sahel, 3157th Foreign Affairs Meeting, Brussels, 22 and 23 March 2012 (Brussels, 2012).

252See Chapter Six of this thesis at 6.5.

253See EUSR for the Sahel, fn 154 above. This is in line with the Sahel Strategy (see fn 24 above)

254Even one which is specific to Mali.

255Davies, fn 229 above, p 264.

elsewhere.²⁵⁶ Even the government of Mali was reportedly pleased that the EU engaged at that time.²⁵⁷

Whether the lack of an active preventive diplomacy under the CFSP framework at the earlier stage is a significant loss of opportunity or not, it could go down as a lost opportunity for constructing a united whole *vis-à-vis* synergy in the sequencing of policy options available to resolve a crisis and ultimately enhance, if not ensure coherence, including policy coherence for development. Indeed, although the EUSR was appointed for the Sahel as a region, his mandate centred mainly on the Mali crisis,²⁵⁸ and pertinently include:

'to actively contribute to the implementation, coordination and further development of the Union's comprehensive approach to the regional crisis, on the basis of its Strategy, *with a view to enhancing the overall coherence and effectiveness of Union activities in the Sahel, in particular in Mali*'.²⁵⁹

In view of these, it may therefore be wondered why the EU did not engage initially in Mali using EUSR. As indicated above, this could be due to resource limitations. However, it could also be due to the hesitation of Member States who are charged with the responsibility for conducting the CFSP with the HR/VP using national and Union resources. But while resource limitation can influence a decision by the Member States not to adopt a relevant measure, this could sometimes only be the partial reason. For example, as discussed in Chapter Two, the historical background of EU relations with SSA continue to trail the relationship between the

²⁵⁶Ibid.

²⁵⁷Ibid., p 271.

²⁵⁸See for example Article 2(3) EUSR for the Sahel, fn 154 above: 'Initial priority shall be given to Mali and to the regional dimensions of the conflict there.' also see Article 2(4); and most of Article 3.

²⁵⁹Article 3(1)(a) [author's emphasis].

two. While the EU Member States at the heart of the historical relations between Europe and SSA are arguably keen to *Europeanise* their foreign policy, their 'European reflex for SSA' is not always matched by the 'European reflex' of other Member States who traditionally had no Africa policy. Of course, the former have more interests in SSA than the latter and the fact that the CFSP arrangements do not force the Member States to adopt a common policy²⁶⁰ means that a CFSP action may not always be possible. Having said that, it could be argued from a legal perspective that the Member States may be acting illegally if they renege from their obligations under the adopted legal CFSP decisions. For example, while the provisions of the Treaties that require them to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity, and to refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations²⁶¹ does not force the Member States to adopt CFSP instruments, it is arguable that they are bound to the provisions of any instrument that they do adopt. This would mean that the Member States are bound to the provisions of the Common Position on Conflict prevention in Africa which requires the coherent use of all the instruments available to the EU, including preventive diplomacy, for conflict prevention. However, as indicated above, although the legal and political requirement of coherence, including policy coherence for development does not apply any less to the CFSP than they apply to the non-CFSP external action of the Union, the CFSP is way outside any possible regulation like the latter.²⁶²

Overall, it may be that EU Member States were not keen on the Mali crisis primarily due to resource limitations or due to this and indifference (or even deference to Member State(s) that

260At 5.2.1. above.

261Pursuant to Article 24(3) TEU (ex-Article 11(2) TEU).

262However, see the discussion in Chapter Two of this thesis at 5.2.4.

are more affected by the crisis). In fact Davies explains that Mali which was a former French colony has long been a priority for French, and to a lesser extent Spanish foreign policy, and that both countries tried to push for more EU engagement for some time without much success until the deaths of European hostages prompted more interest from other states, notably the UK. Indeed, as discussed in Chapter Six of this thesis,²⁶³ although it was subsequently to gain the support of some other EU Member States, it was France which arguably have more vested interest in Mali than any other EU Member State that eventually took the initiative to answer the call for military intervention in Mali after it failed to convince other EU Member States on the need to respond to that call.

5.6. Conclusion

The Chapter set out to analyse the CFSP with special reference to SSA, and ultimately with a view to determining the question of policy coherence and also the coherence of EU external action towards the region *vis-à-vis* synergy in the sequencing of policies. The Chapter submitted that the Lisbon Treaty entrenches the indefinite and potentially illimitable scope of the Union's CFSP competence which continues to depend on distinct rules, instruments and institutional procedures post as pre-Lisbon. It especially highlighted the invariably inextricable overlap between the relevant norms of the CFSP and development objectives, and suggested that the unsettled question of hierarchy in the context of the security-development nexus theoretically implies that policy coherence for development as it relates to the CFSP may amount to a *façon de parler*. Against this controversial suggestion, it argued that the invariably inextricable nexus between security and development could in any event also imply that the work of the HR/VP

263At 6.5.3.

and the EEAS under the CFSP could automatically be considered compliant with the requirement of policy coherence for development if not development measures by other means. However, using Mali as a case study, the Chapter illustrated that while the EU can boast of long term CFSP conflict preventive measures, these are mainly regionally-focused and are not necessarily always complemented with *ad hoc* and targeted CFSP measures which may be required for the construction of a united whole *vis-à-vis* synergy in the sequencing of policy options available to prevent violent crisis. In this regard, it concedes that although the use of *ad hoc* and targeted CFSP measures may be constrained by resource limitations, and perhaps an element of deference or indifference based on the historical factors discussed in Chapter Two, these do not detract from the attendant implications for overall coherence of EU external action and for policy coherence for development, as well as from the fact that the influence of the HR/VP and the EEAS regarding the relevant unfavourable factors may be quite limited. Significantly, same factors and implications are arguably at play in the context of the *ad hoc* and targeted security measures of the CDSP as discussed in the next Chapter.

Chapter Six

6.0. The common Security and Defence Policy in Sub-Saharan Africa: the EU or Member States?

6.1. Introduction

In line with the aim of this thesis and the relevant previous Chapters on pertinent EU policies towards SSA, this Chapter investigates EU external action towards SSA under the CSDP framework with a view to determining the overall coherence of EU external action and the coherence of this policy with development objectives using Mali as a case study. As will be recalled from the relevant previous Chapters of this thesis,¹ the CSDP is an integral part of the CFSP² which was discussed in the preceding Chapter.³ Nevertheless, the former is *de facto*, if not *de jure* functionally distinct from the CFSP.⁴

In general, the CSDP is a distinct policy comprising three elements namely armaments policy, collective defence, and crisis management.⁵ This Chapter is not concerned with the first two elements which are not direct aspects of EU external action towards SSA.⁶ Rather, it is

¹See Chapters One, Two and Five of this thesis.

²Article 42(1) TEU (ex-Article 17(1) TEU). The CFSP covers all areas of foreign policy and all questions relating to EU's security, including the CSDP (Article 24(1) TEU (ex-Article 11(1) TEU).

³Chapter Five.

⁴In fact, an idea was put forward at the 1996 Intergovernmental Conference (IGC) to establish the security and defence policy as a Fourth Pillar in that pillar structure, even though this option was eventually dropped (see Heisbourg, F, 'European Defence: Making it Work', ISS *Chaillot Papers* 42, September 2000, p 27). However, as mentioned in the previous Chapter, although the CFSP and the CSDP are functionally distinct, none of them can be extensively discussed without references being made to the other. In particular, in so far as the CSDP is an integral part of the CFSP and is embedded in that legal framework, its discussion is not void of extensive mention of the CFSP.

⁵See Heisbourg, fn 4 above, p 2, where he distinguishes between crisis management and other aspects of the CSDP; also see Trybus, M, 'With or without the EU Constitutional Treaty: Towards a Common Security and Defence Policy' (2006) *ELR* 145, p 146. The Treaty provisions covering the three different elements are all found under Section 2 of Chapter I Title V TEU on the CSDP.

⁶However, see CSDP Handbook (Vienna/Brussels: European Security and Defence College (ESDC), 2010) p 58 where it is suggested that 'the mutual assistance clause' (an aspect of the collective defence) prioritises 'operations to fight armed aggression inside and preventively also outside the EU'. In any event, this is outside the scope of this thesis.

concerned with the third element namely crisis management. In this regard, it is noteworthy that the concept of crisis management arguably represents the external dimension of providing security by EU through all the means available to it.⁷ However, this Chapter is specifically concerned with crisis management under the CSDP framework.⁸

In doing this, the Chapter does not seek to account for the entirety of CSDP actions in SSA. Rather, in line with the focus of this thesis, the enquiry centres on the norms, instruments and institutional aspects of the CSDP. This is with a view to determining the issue of policy coherence for development in this Chapter. However, it is also with a view to determining the overall coherence of EU external action based on the construction of a united whole *vis-a-vis* synergy in the sequencing of available policy options as subsequently discussed in Chapter Seven. As a central theme of this thesis, the dimension brought by the post-Lisbon High Representative for Foreign Affairs and Security Policy (HR/VP) and the European External Action Service (EEAS) is also discussed.

The Chapter submits that although the CSDP is an integral part of the CFSP and is embedded in the latter's framework as codified at Lisbon, its specificity is illustrated not only by its distinct scope of objectives which was widened at Lisbon but also by its distinct institutional procedure. Against this background, it argues that while there is an overlap between the scope of the CSDP and development policy, the question of policy coherence for development even as a *façon de parler* may not arise with regards to the strictly short term *ad hoc* CSDP measures as with trade

⁷See Blockmans, S, 'An Introduction to the role of the EU in Crisis Management' in Blockmans, S, (ed.) *The European Union and Crisis Management: Policy and Legal Aspects* (The Hague: TMC Asser, 2008), p 9.

⁸See Trybus, M, *European Union Law and Defence Integration* (Oxford: Hart, 2005), p 306 where he explains that crisis management is the CSDP aspect closest to foreign policy and an aspect of security policy as a form of foreign policy.

and CFSP instruments which are long term measures. Nevertheless, using Mali as a case study, it concedes that this does not mean that the question of policy coherence for development is irrelevant in the context of the CSDP as it relates to the determination of coherence based on a constructive whole *vis-a-vis* synergy in the sequencing of policy options available to resolve a crisis or conflict. Furthermore, it submits that in any event the potentials for the HR/VP and the EEAS to enhance coherence as it relates to the CSDP may be quite limited if not non-existent in the light of the specific objectives and institutional procedure of the CSDP.

The structure of this Chapter follows that of the last three Chapters on specific policy. The first section provides the contextual background to the CSDP, and pertinently analyses the legal basis and the scope of its objectives with special reference to SSA. The second section presents a pertinent overview of the instruments of the CSDP with special reference to SSA. This is followed by the discussion of the institutional dimension of the CSDP with special reference to the region in the third Section. The fourth and final section centres on Mali as a case study. Apart from the discussion of policy coherence for development in this Chapter, a case study of the CSDP in Mali will aid the subsequent assessment of the overall coherence of EU external action especially as it relates to the construction of a united whole *vis-a-vis* synergy in sequencing of available policy options.⁹ Similar to the previous three Chapters, the case study focuses mainly on the pertinent instruments and norms of the CSDP towards SSA as they apply to Mali. It therefore does not revisit the institutional dimension since this is globally applicable to the region. However, this does not mean that the institutional dimension is completely eschewed from mention where necessary.

⁹See Chapter Eight of this thesis.

6.2. The legal basis, scope of objectives and instruments of the CSDP with special reference to SSA

Although the CSDP is an integral part of the CFSP, its distinct functional logic comes with a distinct legal basis and scope of competence. This section discusses the legal basis and scope of objectives of CSDP crisis management with special reference to SSA. Similar to the previous EU policies investigated, these provide the legal background to the subsequent discussion of the relevant CSDP procedures as well as the framework for the Mali case study. However, prior to these, the section briefly examines the distinct factors around which the CSDP evolved, as well as the political developments that eventually led to the decision to establish an operational CSDP. These are influential on the nature of the normative framework of the CSDP. They therefore form part of the essential background for an understanding of the factors that affect coherence as it relates to the CSDP especially in the context of EU external action towards SSA. Furthermore, they also illustrate the specificity that absolves the CSDP from any expectation of substantial adherence to the requirement of policy coherence for development in contrast to the context of the CFSP where this requirement is nevertheless arguably a *façon de parler*.¹⁰

6.2.1. Beyond the CFSP: a pertinent contextual background to CSDP crisis management

As discussed above,¹¹ although the origin of EU foreign policy as it relates to the CFSP in general has been traced back to the European Defence Community (EDC),¹² the latter which is

¹⁰See Chapter Five of this thesis.

¹¹At 5.2.1.

¹²The EDC has been briefly touched upon in Chapter Five of this thesis as the first step in the evolution of a foreign policy framework under which EU Member States would formulate and put forward a common foreign and security stance on the international scene. For the present analysis, suffice it to point out that it was a strictly defense-oriented organisation which failed mainly due to its 'supranational' tendency. However, though the EDC failed, its understanding is considered a *sine qua non* for a proper understanding of security and defence policy as it continues to evolve in the EU. Indeed, it is doubtful whether there is any comprehensive study or commentary

strictly defence-oriented could veritably be distinctly linked to what is today the CSDP framework. Indeed, following the failure of the EDC, the defence aspect was not only separated from the mainstream of integration pursued through the EEC/EC,¹³ but also from the path of political cooperation from which the CFSP latter evolved.¹⁴ Defence was pursued separately through the now defunct Western European Union (WEU).¹⁵ Similar to the EDC, the WEU was a defence organisation. However, in line with the post-Cold War shift from classical ‘defence’ to ‘security’,¹⁶ the WEU eventually adopted a security policy by way of what are known as the Petersberg Tasks.¹⁷ These are nevertheless military-oriented security activities and are therefore also associated with defence.¹⁸ During this time, the WEU was recognised as a potential channel for the coordination of military means by the EU especially for EU external action towards SSA.¹⁹ Arguably, this was due to sensitivities regarding the incorporation of the military-

on EU security and defence policy that does not discuss or at least make reference to the EDC.

13See Chapters One and Two of this thesis.

14See Chapters Two and Five of this thesis.

15The now defunct WEU was a regional organisation formed by the European Member States of the Northern Atlantic Treaty Organisation (NATO) and Turkey (in this regard, membership in the EU was not a requirement for membership in the WEU). For further information on the WEU see <http://www.weu.int/>, accessed 25 February 2011.

16See Trybus, M, and White, N, (ed.) *European Security Law* (OUP, 2007), p 4 for analysis of the reason behind these shifts. Invariably, classical self-defence is about territorial self-defence from potential external aggression (see Article 51 of the United Nations (UN) Charter).

17See Trybus, M, ‘The vision of the European defence community and a common defence for the European Union’ in Trybus and White, fn16 above, p 31). The Petersberg Tasks which are presently in Article 43(1) TEU (see the scope of the CDSP at 6.3. below) were originally set out in the Petersberg Declaration adopted at the Ministerial Council of the Western European Union (WEU) in June 1992.

18Duke, S, ‘CESDP: Nice’s overtrumped success’ [2001] 6 *EEA. Rev* 155, p 157; Roper, J, ‘Defining a common defence policy and common defence’ in Roper, J, and Martin, L, (ed.) *Towards a common defence policy* (Paris: WEU, ISS, 1995), p 8. The Petersberg Tasks were for a long time referred to as ‘decisions with defence implications’ under ex-Article 17(3) TEU (also see Wessel, R, ‘The State of Affairs in EU security policy: the breakthrough in the Treaty of Nice’ (2003) 8 *JCSL*, p 274, 288); and Von Kielmansegg, G, S, ‘The Meaning of Petersberg: Some Considerations on the Legal Scope of ESDP Operations’, (2007), 44 *CML. Rev.*, p 629-630; and also Martenczuk, B, ‘Community Cooperation Policy and Conflict Prevention’ in Kronenberger, V, (ed.) *The European Union and the International Legal Order – Discord or Harmony?* (The Hague: TMC Asser, 2001), p 209; and Blockmans, S, ‘An Introduction to the role of the EU in Crisis Management’ in Blockmans, fn 7 above, p 1. The concept of ‘security’ does not exclude ‘defence’ (see 5.1. above).

19However, despite the presence of EU Member States with a relevant history in the region, the WEU was ‘conspicuously absent’ in SSA (see Lenzi, G, ‘WEU’s Role in SSA Africa’ in Vasconcelos, A, *et al.*, ‘WEU’s Role in Crisis Management and Conflict Resolution in Sub-Saharan Africa’, (1995) ISS, *Chaillot Papers* 22, p 7, and 37–38). Indeed, in general, it has been suggested that the only official request of the EU in the first half of the nineties to make use of WEU capabilities concerned the support for the EU administration of the Bosnian town of Mostar in 1994 (see Blockmans, fn 7 above, p 2). Furthermore, it has been suggested that the WEU was ‘devoured’

oriented Petersberg Tasks into the EU framework. Indeed, although they eventually evolved into an aspect of EU security policy,²⁰ the incorporation of the military-oriented Petersberg Tasks into the EU framework was affected by additional factors beyond those that affected cooperation under the wider CFSP. The nature of these factors forms the pivot around which the distinct character of the CSDP and its implications for coherence revolves. For example, the main factor that worked against cooperation in foreign and security policy under the wider CFSP in general is the issue of national sovereignty.²¹ In contrast, when it came to cooperation in matters with military or defence implications, the issue went beyond mere sovereignty to include the military and strategic culture of the Member States.²² Of specific pertinence to crisis management were issues of national dispositions or sensitivities to the use of force, the projection of power, and the legitimacy of intervention.²³ Indeed, it did not only take Europe's general dissatisfaction with the disappointing inaction of the EU during the Yugoslavia wars,²⁴

by the EU to give birth to the CSDP (see in general Wessel, R, 'The EU as Black Widow: Devouring the WEU to Give Birth to a European Security and Defence Policy' in Kronenberger, fn 18 above, writing with regards to the ESDP the precursor of the CSDP).

20Von Kielmansegg, G, S, 'The European Union's competences in defence policy – scope and limits' (2007) 32 *ELR* 2 above, p 217; also see Duke, fn 18 above, at fn 26; and Trybus, fn 8 above, p 306. They were for the first time incorporated into the EU framework in Amsterdam (see 2.1. above) by virtue of ex-Article 17(2) TEU.

21See Chapter Five of this thesis. For example, the focus of post EPC and pre-CFSP debate was how the Member States can establish, '[...] an institutionalised framework which on the one hand would enable them to adopt and effectively implement a common stance without, on the other hand, undermining their national sovereignty over the exercise of foreign policy' (Koutrakos, P, *EU International Relations Law* (Oxford: Hart, 2006) p 18).

22See Tsagourias, N, 'EU Peacekeeping Operations: Legal and Theoretical Issues' in Trybus and White, fn 16 above, p 132: 'Member States have different military traditions, dogmas, and capabilities' (at p 132 he specifically notes that France and the UK, have a long history of military activism). With regards to the external projection of national security and defence capability, France and Britain have always remained the two Member States with the most significant power-projection interests and capabilities in military terms (Piris, J, *The Lisbon Treaty: A legal and Political Analysis* (Cambridge University Press, 2010), p 266).

23These were areas of deep divisions between Member States in terms of their approaches to security (Menon, A. 'Empowering Paradise? The ESDP at Ten' (2009) 85 *IA* 2, p227). There has also been a reference to the 'peacekeepers' and the 'war fighters' (see Grevi, G, *et al*, 'Introduction' in Grevi, G, *et al* (ed.) 'European Security and Defence Policy: 10 years after (1999-2009)', Paris, *JSS* 2009, p 13). In fact, as one commentator emphatically notes the 'political divergences between Member States on the Union's very legitimacy in defence matters were structural, permanent and irreconcilable, notwithstanding the diplomatic discourse to which the [...] Treaties [...] bear witness' (Gnesotto, N, 'Preface', in Heisbourg, fn 4 above at v). Indeed, an EU Member State namely Denmark expressly opted out of matters with defence implications by virtue of a declaration attached to the Treaties (See Article 5 of Protocol (No 22) on the position of Denmark, annexed to the TEU and the TFEU).

24During this wars which happened in the EU's direct sphere of influence, NATO was led by the US in taking military control while the EU was inert due to what has been described as the 'capabilities-expectations gap' (see Hill, C, 'The Capability-Expectations Gap, or Conceptualising Europe's International Role' (1993) 31 *JCMS* 505-

but also the proactive persuasion and leadership of the two EU Member States with the most significant power-projection interests and capabilities in military terms²⁵ for the evolution of the CSDP to start within the EU framework. Arguably, the former led to the success of the latter. Suffice it to state that the relevant two Member States namely France and Britain was able to successfully push their Saint Malo Declaration of 1998²⁶ to the EU agenda. Significantly, this was a culmination of successive earlier attempts by the two to 'Europeanise' their security policies towards SSA.²⁷ The Declaration which was adopted as an EU objective six months later at Cologne²⁸ mainly stressed that: '[...] the Union must have the capacity for autonomous action backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crisis [...].' This was the impetus for the Helsinki

328; and also Hill, C, 'Closing the capabilities-expectations gap?' in Petersen, J, and Sjurksen, H, (eds.) *A Common Foreign policy for Europe? Competing Visions of the CFSP* (London: Routledge, 1998), p 18-38.

25 See fn 22 above.

26 Available at <http://www.fco.gov.uk/resources/en/news/2002/02/joint-declaration-on-eu-new01795>, accessed 12 March 2011.

27 As will be recalled from Chapter Two of this thesis at 2.2.4., these two EU Member States have a strong and enduring historical relations with SSA dating back to years before European integration. It has been suggested that France arguably began to *Europeanise* its SSA policy by seeking European legitimation at the Corfu European Council in June 1994 despite the UN's prior legitimation of its operation in Rwanda. Subsequently, a Franco-British initiative was presented after a summit held in Chartres in November 1994 with the objective of supporting peacekeeping mechanisms in Africa, both in the Organisation of African Unity (OAU) and sub-regional frameworks. While the OAU/United Nations (UN) relationship was recognised as paramount in all phases, the WEU was to 'mobilise the European support' and to 'coordinate European contributions'. In May 1995, the WEU Lisbon Council stated ministers' 'interest in the initiative taken by France and the [UK]' (see Vasconcelos, A, 'Should Europe Have a Policy on Africa?' in Vasconcelos, fn 19 above). This was the background to the first Council Common Position 97/356/CFSP concerning conflict prevention and conflict resolution in Africa [1997] *OJ L153/1* (see Chapter Five of this thesis at 5.3.1. and especially, at fn 130). Saint-Malo became their next convergence. Post Saint-Malo the Anglo-French Summit at *Le Touquet* in February 2003 declared a need to 'propose to [their] partners that the EU should examine how it can contribute to conflict prevention and peacekeeping in Africa, including through EU autonomous operations, in close cooperation with the UN' (see Anglo-French Summit (2003a) Declaration on Strengthening European Cooperation in Security and Defence, *Le Touquet* 4 February 2003; and also Anglo-French Summit (2003b) Declaration on Franco-British cooperation in Africa, *Le Touquet*. 4 February 2003 – a statement which addressed a wide variety of tools for fostering stability in SSA, including the need to prevent conflict and/or re-establish peace, both of which are 'of constant concern' (these declarations are cited in Vasconcelos). As will be recalled from Chapter Six of this thesis, the Treaties preserve the power of the Member States to conduct their foreign, security and defence policies. The Member States are also not unconscious of this. For example, most recently, the British Prime Minister David Cameron proclaimed that 'Britain and France are, and will always remain sovereign nations, able to deploy [our] armed forces independently and in [our] national interest when we choose to do so (BBC News, "Cameron and Sarkozy hail UK-France defence treaties" available at <http://www.bbc.co.uk/news/moblie/uk-politics-11670247>, accessed, 12 December 2010).

28 The Cologne European Council, June 1999.

Headline Goal 2003 which was adopted by the European Council with the plan of setting up an autonomous EU operational capacity supported by credible means and decision-making institutions.²⁹ The goal included a plan for a joint military ‘European Rapid Response Force (ERRF)’.³⁰ The forces were, *inter alia*, to be militarily self-sustaining with the necessary command and control.³¹ Although this *prima facie* seems close to creating a European army, it was expressly stated that the latter was not the intention.³² In any event, the goal of creating the ERRF was never realised.³³ Instead, other flexible capability mechanisms evolved,³⁴ with implications for coherence.³⁵ And this can equally be said of the successfully established but specifically distinct decision-making institutions.³⁶ Suffice it to state that the sensitivities to the military-oriented aspects of security only led to their incremental introduction into the Treaties. Invariably, this is not without the accommodation of legal and operational flexibility that continues to blight crisis management under the CSDP with implications for coherence in practice³⁷ as discussed below,³⁸ and further illustrated with Mali case study.³⁹

29European Council, Presidency Conclusions: European Council Meeting in Helsinki, 10-11 December 1999; this was amongst many other decisions on the strengthening of the common European policy regarding security and defence policy (Wessel, R, *The European Union’s Foreign and Security Policy: A Legal Institutional Perspective* (The Hague: Kluwer, 1999), p 273).

30Helsinki Headline Goal (available at

<http://www.consilium.europa.eu/uedocs/cmsUpload/Helsinki%20Headline%20Goal.pdf>, accessed 10 August 2-13).

31Presidency Progress Report to the Helsinki European Council on Strengthening the Common European Policy on Security and Defence, Annex 1 to Annex IV of the Presidency Conclusions (cited in Trybus, fn 8 above, p 97 at fn 23); also see Wessel, fn 29 above, p 276.

32See Blockmans, S, and Wessel, R, ‘The European Union and Crisis Management: Will the Lisbon Treaty make the EU more effective?’, *CLEER Working Papers* 2009/1, p 44; and also Wessel, fn 29 above, p 274.

33Not even after a subsequent Headline Goal 2010 was adopted in 2010 has this been remedied.

34See 6.4.2. below.

35Ibid.

36See 6.4.1. below.

37See for example, Okemuo, G, ‘The EU or France? The CSDP Mission in Mali and the consistency of EU-Africa policy’ [2014] 34 *LLR* 3, 217-240.

38On the legal aspect see 6.3. below; and on the operational see 6.4.2. below.

39See 6.5. below; and also further Chapter Eight of this thesis.

6.2.2. The legal basis for CSDP crisis management with special reference to SSA

In line with its incremental introduction into the EU framework, there was no distinct CSDP section in the relevant pre-Lisbon Treaties beyond the general CFSP section.⁴⁰ However, ex-Article 17(1) TEU of the Amsterdam Treaty provided for the ‘progressive framing of a common defence policy’ and ex-Article 17(2) TEU covered the Petersberg Tasks.⁴¹ Wessel considers Article 17(1) as the appropriate legal basis for CSDP crisis management.⁴² In contrast, after considering this as a possibility, Von Kielmansegg opines that Article 17(2) TEU on the Petersberg Tasks ‘seems to offer firm grounds’.⁴³ In any event, these arguably refer only to the substantive legal basis for CSDP crisis management.⁴⁴ Otherwise, there is no other way to explain the express indication of ex-Article 14 TEU as the legal basis for CSDP crisis management in the pre-Lisbon era.⁴⁵ As will be recalled from the previous Chapter, ex-Article 14 TEU on the Joint Action was the general CFSP legal basis for ‘operational action by the

⁴⁰Compare example ex-Article 17 TEU with Article 42 TEU to 46 TEU.

⁴¹See 6.3.2. below.

⁴²Wessel, fn 29 above, p 287.

⁴³Von Kielmansegg, fn 18 above, p 629.

⁴⁴See 2.3. above for the distinction between substantive and procedural legal basis.

⁴⁵This is well illustrated by the pre-Lisbon CSDP crisis management in SSA (see for examples Council Joint Action 2005/557/CFSP on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan (AMIS) (2005) *OJ* L188/46; Council Joint Action 2003/423/CFSP on the European Union military operation in the Democratic Republic of Congo (*ARTEMIS*) [2003] *OJ* L143/50; Council Joint Action 2006/319/CFSP on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (EUFOR DRC) [2006] *OJ* L116/98; Council Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic (Tchad/RCA) [2007] *OJ* L279/21; Council Joint Action 2008/749/CFSP on the European Union military coordination action in support of UN security Council resolution 1816(2008) (EU NAVCO) [2008] *OJ* L252/39; Council Joint Action 2008/851/CFSP on the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali Coast (EUNAVFOR Somalia, also known as ATALANTA) [2008] *OJ* L301/33; Council Joint Action 2004/847/CFSP on the European Union Police Mission in Kinshasa (DRC) regarding the Integrated Police Unit (EUPOL ‘Kinshasa’) [2004] *OJ* L367/30; Council Joint Action 2007/405/CFSP on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo) [2007] *OJ* L151/46; Council Joint Action 2005/355/CFSP on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of Congo (DRC) (EUSEC) [2005] *OJ* L112/20; Council Joint Action 2008/112/CFSP on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR Guinea-Bissau) [2008] *OJ* L40/11). There are usually also references to ex-Article 28 on financing and sometimes ex-Article 25 on the Political and Security Committee where relevant (on the Political and Security Committee see 6.4. below).

Union’ where an international situation so requires. Crisis management falls under this description. Nevertheless, it is arguable that this does not provide an adequate legal justification for the choice and express indication of ex-Article 14 TEU as the sole legal basis for pre-Lisbon crisis management while ex-Article 17(2) TEU which provided for the Petersberg Tasks⁴⁶ was only referred to in follow-up decisions for ‘launching’ the operations⁴⁷ subsequent to the adoption of the Joint Action. Wessel considers this striking from a legal perspective⁴⁸ and appears justified by the post-Lisbon law and practice. Post-Lisbon EU competence and therefore substantive legal basis for CSDP crisis management is outlined in Articles 42 TEU⁴⁹ and 43(1) TEU.⁵⁰ By virtue of Article 42 TEU

‘The [CSDP] shall be an integral part of the [CFSP]. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for *peace-keeping, conflict prevention and strengthening international security* in accordance with the principle of the [UN] Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.’⁵¹

⁴⁶See 6.3.2. below.

⁴⁷The decision to launch an operation usually follows the main decision for a Joint Action (see for example Council Decision 2008/101/CFSP on the launching of the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA) [2008] *OJ L*34/39; Council Decision 2003/432/CFSP on the launching of the European Union military operation in the Democratic Republic of Congo (2003) *OJ L*147/42; This is not peculiar to SSA, but was for example also the case in the EU military operation in Macedonia (FYROM) and the EU Police Mission in Bosnia and Herzegovina (see Council Joint Action 2002/210/CFSP [2002] *OJ L*70 (cited in Wessel, fn 29 above, p 284 where he also suggest the contrasting view (at p 286) that the use of ex Article 17(2) TEU as a legal basis for the follow-up decision on the launching of EUFOR Macedonia was an indication that the Council seemed to have come to ‘the realisation’ that ex-Article 17 TEU was more appropriate as the legal basis for EU crisis management).

⁴⁸Wessel, fn 29 above, p 287.

⁴⁹Ex-Article 17(1) TEU as amended.

⁵⁰Ex-Article 17(2) TEU as amended.

⁵¹Author’s emphasis to highlight the fact that these are at the heart of the CSDP crisis management. The dimension of capabilities as provided by the Member States is discussed at 6.4.2. below. On another note, it is noteworthy that the reference to the UN is not accidental. The UN is the apex institution with responsibility for international peace and security, and the UN Charter forms the foundation on which the CSDP as a core aspect of European security architecture is built (see Trybus, fn 8 above, p 15). Indeed, the commitment of European integration projects to the objectives of the UN is regularly spelt out in the preamble of the respective Treaties and the relevant Treaty Articles as well as other core EU documents. However, it has been suggested that the pledges by the EU to act in accordance with the UN Charter is of no legal significance. This is because Article 103 of the Charter explicitly stipulates that Charter provisions prevail in case of a conflict with other international agreements (see Wessel, fn 29 above, p 65). In any event, it is not clear how the EU’s commitment sits with the autonomy of the EU legal order as espoused by the ECJ (see for example T-85/09 *Kadi v Commissions (Kadi II)* [2010] ECR II-5177; and De Burca, G, ‘The EU, the European Court of Justice and the International Legal Order after Kadi’,

The crisis management tasks which are included in the notions of ‘peace-keeping’ and ‘conflict prevention’,⁵² are further expanded in Article 43(1) TEU:

‘The tasks referred to in Article 42(1) in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism.’

Arguably, Article 43 TEU completes and covers Article 42(1) TEU on CSDP missions.⁵³ Thus Article 43 TEU is an adequate substantive legal basis for CSDP crisis management post-Lisbon. However, in practice, it is used in conjunction with Article 28 TEU (ex-Article 14 TEU) on ‘operational action’.⁵⁴ In the same vein, Article 43(2) TEU is specifically used for follow-up decisions⁵⁵ similar to its predecessor – ex-Article 17(2) TEU. Pertinently, both the substantive and procedural legal basis for CSDP crisis management illustrate the specifically *ad hoc* nature

(2009) 1 HILJ, 51). Conversely, it is not clear how the autonomy of the EU legal order sits with Article 103 of the UN Charter. In any event, everything the EU has done in the field of security are linked to UN objectives (Report on the implementation of the EU Security Strategy – providing security in a changing world’ Brussels, S407/08, December 2008, Executive Summary, para 12). In fact, CSDP military operations has been differentiated into three categories as they relate to UN operations namely: stand-alone operations that are mandated by the Security Council with no simultaneous UN-led deployment, stand-by operations with the objective of supporting a pre-existing UN-led operation, and rapidly deployed bridging operations of relatively short duration preparing for the arrival of an UN-led operation. This link to the UN does not affect the independent character of CSDP operations as the autonomy of EU action has been stressed as a core concept (see Cramer, P, ‘Reflections on European Effective Multilateralism and the use of force’ in Koutrakos, P, and Evans, M, (eds.) *Beyond the Established Legal Orders* (Oxford: Hart, 2011), p 240). The question of coherence between the EU and the UN is outside the scope of this thesis.

52Ibid.

53On the scope of CSDP crisis management objectives, see 6.3.2. below.

54See for example EUTM Somalia (see for example Council Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces (EUTM) [2010] *OJ* L44/16; and Council Decision 2010/565/CFSP on the European Union Mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (EUSEC RD Congo) [2010] *OJ* L248/59).

55See for example, Council Decision 2011/537/CFSP amending and extending Decision 2010/576/CFSP on the European Union Police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of Congo (EUPOL DR Congo) [2011] *OJ* L236/8.

of the CSDP. The direct implication of this, is that there is no room for the substantive accommodation of policy coherence for development under the CSDP framework. Of course, this is not to say that the question of coherence based on a constructive whole *vis-a-vis* synergy in the sequencing of policy options available to resolve a crisis does not relate to policy coherence for development.⁵⁶

6.2.3. The scope of objectives of CSDP crisis management with special reference to SSA

Similar to the incorporation of the CSDP into the Treaties, the scope of CSDP crisis management including in SSA has *de facto* taken an incremental path from its origin in the WEU. In this regard, the initial group of specified tasks as first incorporated in Article 17(2) (*viz* the Amsterdam Treaty) includes 'humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peacemaking'. No changes were made to these, at least *de jure*, till Lisbon. As explained in the previous two pages, while Article 42(1) indicates that peacekeeping, conflict prevention and overall strengthening of international security are at the heart of CSDP crisis management, Article 43(1) spells out the relevant tasks to be used in this regard. These include '*joint disarmament operations*, humanitarian and rescue tasks, *military advice and assistance tasks*, *conflict prevention* and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking and *post-conflict stabilisation*'.⁵⁷ These are the essence of CSDP crisis management and are also to a certain extent representative of the scope of the latter. However, it is noteworthy that the Lisbon Treaty brings the scope of the CSDP crisis management up to date by incorporating what are already aspects of practice including the civilian aspects of crisis management.⁵⁸ The latter which was

⁵⁶See for example 6.5. below; and further Chapter Eight of this thesis.

⁵⁷Author's emphasis to illustrate the Lisbon additions to the original Petersberg Tasks.

⁵⁸See Piris, fn 22 above, p 275 where he opines that the list of tasks was brought 'up to date'. This would imply

established in 2000 to complement the military aspects of the CSDP framework covers four priority areas namely police, strengthening of the rule of law, strengthening civilian administration and civil protection.⁵⁹ Similar to the military aspects of crisis management, the specific capabilities in these four fields are mainly for EU-led autonomous missions, or in operations conducted by lead agencies such as the UN.⁶⁰ This was arguably inspired by the evolving comprehensive EU approach even if it morphed into this from the Commission's attempt to enhance and better coordinate EU crisis management tools under development policy framework on the one hand, and the Member States' non-military crisis response tools on the other hand. Indeed, in 2003, the European Security Strategy (ESS)⁶¹ recognised that 'in almost every major intervention, military efficiency has been followed by civilian chaos,' and therefore emphasised that: '[the EU] should think in terms of a wider spectrum of missions. This might include joint disarmament operations, support for third countries in combating terrorism and security sector reform. The last of these would be part of broader institution building.'⁶²

that the Lisbon changes in this area are a formal confirmation of what already exists in practice.

59See Civilian Crisis Management, available at <http://www.consilium.europa.eu/eeas/security-defence/civilian-crisis-management?lang=en>, accessed 21 December 2011. (Schuyer, J, 'The Civilian Headline Goal 2008: Developing Civilian Crisis Management Capabilities for the EU' in Blockmans, fn 7 above, p 135). For example, the UK employs non-military crisis response tools under its Department for International Development (DFID). It is noteworthy that while the UK seems to be more widely known for its bilateral development oriented security policies, it is no longer the only EU Member State that conducts such policies. For example, Germany recently developed its "Civilian Crisis Prevention, Conflict Resolution and Post-Conflict Peace-Building" (*Aktionsplan "Zivile Krisenprävention, Konfliktlösung und Friedenskonsolidierung"*) (Bundesregierung 2004) with priority tasks that have a number of clear links to SSA (Klingebiel, S, 'Converging development and security policy? New approaches in Africa', German Development Institute (DIE), 2006, p 138, available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=96188>), accessed 19 April 2012. This was therefore a clear move towards vertical coherence. However, this plan for coordination arguably morphed into conducting civilian missions under the CSDP framework quite apart from the security aspects of development policy.

60Or the Organisation for Security and Co-operation in Europe (OSCE).

61A Secure Europe in a Better World--European Security Strategy' (ESS), Brussels, December 12, 2003.

62Ibid., p 12. In this regard, SSR as a part of broader institution building is undertaken 'within the framework of democratic principles, respect for human rights, the rule of law, and good governance, in particular in countries in transition from violent conflict to sustainable peace' (see Article 10 of See Council Common Position 2005/304/CFSP on Conflict Prevention, Management and Resolution in Africa and repealing Council Common Position 2004/85/CFSP) on Conflict Prevention, Management and Resolution in Africa [2005] *OJ L97/57* (hereinafter 'Common Position on Conflict Prevention in Africa'). The latter was preceded by the first two Common Position on Conflict Prevention in Africa (Council Common Position 97/356/CFSP concerning conflict prevention and conflict resolution in Africa [1997] *OJ L153/1*; Council Common Position 2001/374/CFSP of 14 May 2001 concerning conflict prevention, management and resolution in Africa [2001] *OJ L132/1*).

Having said that, it is noteworthy that it is difficult to capture the exact scope of the objectives of the CSDP. This is not solely because 'shall include' as used in Article 43(1) is an indication of an inexhaustible list. There are no generally accepted interpretations for the different concepts used in the field of international peace and security.⁶³ In practice, most of the concepts are recognisably wide in their areas of coverage and could serve as a 'catch-all' phrase. Nevertheless, apart from the notion of conflict prevention which acceptably covers the three different stages of conflict prevention, management and resolution,⁶⁴ most of the concepts in Article 43(1) TEU could conveniently be categorised into measures for the active stage of crisis on the one hand, and post-conflict stage on the other hand. For example, the latter which is represented as 'post-conflict stabilisation' would generally cover any measure aimed at preventing a relapse into war.⁶⁵ Apart from this, the other concepts such as 'joint disarmament operations, humanitarian and rescue tasks, peace-keeping tasks, tasks of combat forces in crisis management, including peace-making would mainly cover the stage of active crisis. For example, humanitarian missions are aimed at protecting the population and securing the supply of their basic needs in times of emergency.⁶⁶ Conversely, rescue task missions aim to evacuate and liberate individuals from emergency or crisis situations.

With regards to peacekeeping, although in its wider meaning it could cover any crisis

⁶³*Wider Peacekeeping* (London: HSMO, 1995), xii).

⁶⁴Prevention, management and resolution (see Chapter Five of this thesis). Prevention is outside the scope of the Chapter.

⁶⁵See Duke, S, and Courtier, A, EU peacebuilding: concepts, actors and instruments', *CLEER Working Paper* 2009/3, p 4. This concept is also interchangeable with peacebuilding, post-conflict reconstruction, post conflict rehabilitation, stabilisation, institution building and state building (Dr. Ann Fitz-Gerald, in her keynote address, 'The future of international security interventions: prospects and challenges' at the 4th Annual Workshop of the Women in International Security (WIIS), Fredericton, CA, May 5, 2011). It is not clear why this is tied to 'tasks of combat forces in crisis management' in Article 43(1) TEU.

⁶⁶Von Kielmansegg, fn 18 above p 629. This would usually involve the deployment of military forces albeit only for the protection and the defence of the mandate not for the purposes of ending the conflict. Humanitarian missions is different from humanitarian aid or assistance which is a financial assistance provided by the EU's Humanitarian Office (ECHO) to alleviate suffering where it becomes acute (presently provided for in Article 214 TFEU).

management activity conducted during the stage of active crisis and even beyond,⁶⁷ the concept as traditionally evolved from the UN entails military intervention operations conducted during the active phase of crisis in support of efforts to achieve or maintain peace and security.⁶⁸ These are normally mandated by the UN.⁶⁹ In this regard, it is noteworthy that there is no functional difference between peacekeeping and peace-making as an aspect of 'combat forces in crisis management' under the EU CSDP framework. For in contrast to the meaning of peacemaking in the UN context,⁷⁰ peacemaking in the EU CSDP framework specifically connotes the use of military force for peace enforcement⁷¹ as would only be mandated by the UN. Arguably, due to the sensitivities discussed above,⁷² 'peace-making' was historically used as a device to avoid mentioning 'peace enforcement'.⁷³ In any event, it is with the above executive missions and military advisory as well as technical assistant tasks of the CSDP crisis management⁷⁴ that the

67See in general Tsagourias, fn 22 above, where all the dimensions of EU crisis management under the CSDP framework are discussed under this heading.

68See for example, Cramer, fn 51 above, p 229. However, peacekeeping operations have been defined as operations distinctly carried out with the consent of the belligerent parties in support of efforts to achieve or maintain peace and security wherein the use of force is limited to self-defence and defence of the mandate (see *United Nations Peacekeeping Operations – Principles and Guidelines* (United Nations Department of Peacekeeping Operations, New York, 2008) 31-35; also *Wider Peacekeeping*, fn 63 above, xii); also see, 'Supplement to An Agenda for Peace', A/50/60-S/1995/1(1995), paras 34-5 where peacekeeping is said to be 'a civilian instrument for attaining humanitarian and peace-maintaining objectives that uses military symbols'.

69See Council Joint Action 2006/319/CFSP fn 50 above (not a humanitarian or stabilising operation *per se*, this was a stand-by military operation in support of a pre-existing UN-led operation).

70Where 'peace-making' refers to the use of diplomatic means to persuade parties in conflict to cease hostilities and negotiate a peaceful settlement (see *Basic Facts about the United Nations* (NY: UN DPI, 1998), p 69; also see Neuhold, H, 'The United Nations System for the peaceful settlement of international dispute' in Cede, F, and Scharipa-Berhmann, (eds.), *The United Nations: Law and Practice* (The Hague: Kluwer, 2001), p 59.

71See Blockmans, fn 7 above, p 9; Naert, F, 'ESDP in Practice: Increasingly Varied and Ambitious Operations' in Trybus and White, fn 16 above, p 95-96; also see Von Kielmansegg, fn 18 above, p 643 that peacemaking is a military oriented task with such limitless scope as to give the Union the flexibility needed in the open and long-term process of its evolution into an actor of security and defence policy.

72At 6.2.1. above.

73See Duke and Courtier fn 65 above, p 39.

74See Article 43(1) TEU; also see Council of the European Union, Action Plan for ESDP support to Peace and Security in Africa, Doc 10538/4/04, Brussels, 16 November 2004 (hereinafter CSDP Action Plan for Africa), especially p 2. Although, the CSDP Action Plan for Africa refers to this as well as to financial dimensions of EU support to peace and security in Africa, the latter is deemed outside the scope of this Chapter in so far as it could conveniently fall within the CFSP or the Joint Africa EU Strategy (JAES) discussed in the next Chapter. Indeed while EU crisis management in SSA beyond the Cotonou Agreement/EU development policy (see Chapter Three of this thesis) could further be divided into CFSP support for peace and security within the framework of the JAES on the one hand, and support for peace and security within the framework of the CSDP on the other hand, some aspects of the CSDP are practically linked into the CFSP/JAES framework (see in general Helly, D, 'A European

analysis in this Chapter is concerned.

6.3. The instruments of the CSDP with special reference to SSA

That the CSDP is an integral part of the CFSP does not bear repeating. Hence, although this does not blur the functional distinction between the two, such distinction is neither rigid nor does it lead to an attendant rigid differentiation between the instruments of their *modus operandi*. Indeed, the two key instruments that determines the *modus operandi* of the CFSP,⁷⁵ would apply to the CSDP even if sometimes in a functionally different way.⁷⁶

6.3.1. The CFSP Common Position on Conflict Prevention, Management and Resolution in Africa:⁷⁷ the key normative background to the CSDP with special reference to SSA.

As discussed in the previous Chapter, the Common Position on Conflict Prevention in Africa⁷⁸ is the EU's general approach to conflict prevention and resolution in Africa.⁷⁹ It sets out the Unions's general commitment to conflict prevention, management and resolution in Africa and the varying approaches for achieving these, albeit not without with an express indication of how these would apply to each pertinent EU external policy. However, it is arguable that the latter could be deduced from the provisions of the Treaties and from a general understanding of the objectives and/or functional dimensions of the different policies. For example, it is not difficult to deduce that the Union's contribution to the prevention, management and resolution of violent

Perspective' in Pirozzi, N, (ed), 'Ensuring Peace and Security: Implementing the EU-Africa Partnership', (2010) *Quaderni IAI*, English Series, 17, p 58; Assanvo, W, and Pout, C, 'The European Union (EU): African Peace and Security Environment's Champion?' (2007) *Points de Vue*, 27 November, p 19-25).

⁷⁵See 5.3. above.

⁷⁶For example, the legal implications of a Joint Action may sometimes not be same for the Member States under the CSDP framework, as it is would be under the CFSP framework (see 6.4.3. below on CFSP crisis management implementation).

⁷⁷Common Position on Conflict Prevention in Africa, fn 62.

⁷⁸Ibid.

⁷⁹At 5.3.

conflicts in Africa 'through enhanced dialogue with, and support for, the [African Union] and sub-regional organisations'⁸⁰ and other long-term conflict prevention and peace-building initiatives⁸¹ would fall outside the scope of the CSDP crisis management. In the same vein, it is not difficult to deduce that the commitment that 'the EU and its Member States shall continue, on a case-by-case basis, to consider deploying their own operational means for conflict prevention and crisis management in Africa, in accordance with the principles of the Charter of the [UN] in close cooperation with UN activities in the region [...]'⁸² is an aspect that falls completely within the CSDP crisis management framework. This contrasts from the Union's commitment to 'support, over the long term, the enhancement of African peace support operations capabilities, at regional, subregional and bilateral levels', which demonstrably may take place both within the context of the CSDP and in other dimensions such as the JAES.⁸³

In the light of the general guideline approach of the Common Position on Conflict Prevention in Africa, sub-instruments drawing from this would be expected. In this regard, the Union's approach to crisis management operations under the CSDP framework is generally defined in the CSDP Action Plan for Africa.⁸⁴ It is noteworthy that this Action Plan is a clear illustration that the dividing line between the CFSP and CSDP is not rigid and may not always be clear especially with regards to the technical aspects of the latter.⁸⁵ For example, the Action Plan covers both '[CSDP] advisory or executive missions in the framework of African led operations or [UN] peacekeeping operations'⁸⁶ and the technical and financial dimensions of EU support

80Article 1(1) Common Position on Conflict Prevention in Africa, fn 62 above.

81Article 1(4), Common Position on Conflict Prevention in Africa, fn 62 above.

82Article 6 Common Position on Conflict Prevention in Africa, fn 62 above.

83See Chapter Eight of this thesis.

84See fn 74 above.

85Further illustrative is the scope of crisis management tasks under the CSDP framework (Article 431(1) TEU).

86Doc 10538/4/04, fn 74 above, p 2.

to peace and security in Africa.⁸⁷ While the latter could be implemented both within the CSDP framework and other frameworks of EU external action towards SSA, the former which is strictly about direct deployments for both military and civilian aspects covering the inexhaustible scope of CSDP tasks as discussed above is specific to the CSDP, and hence the main focus of this analysis. Significantly, this is functionally different from the security policy aspects of development policy which mainly centres around funding including for technical support relating to the relevant security-related activities. Suffice it to state that while there may be conceptual overlap between the two dimensions of EU security policy, this does not translate to functional overlap. Hence what is required between the different dimensions is coherence based on the construction of a united whole *vis-a-vis* synergy in their sequencing as is necessary. As mentioned above, in the light of the specific *ad hoc* functionality of the CSDP crisis management, the question of policy coherence would not arise with regards to the CSDP beyond the outcome of the determination of coherence based on the construction of a united whole *vis-a-vis* synergy in their sequencing as is necessary for the resolution of conflict.⁸⁸

6.3.2. The Joint Action⁸⁹ as an instrument of CSDP crisis management operations

Article 42(1) and Article 43(1) and the above analysis shows that the CSDP crisis management is mainly mission or operation-oriented in nature.⁹⁰ The military operations and civilian missions are the Union's response tool for direct intervention in a violent conflict or crisis.

⁸⁷See fn 74.

⁸⁸See Chapter Eight of this thesis.

⁸⁹The difference between this and Common Positions has been discussed in Chapter Five of this thesis (at 5.3.3.). It will only be mentioned in this Chapter if necessary.

⁹⁰The notion of 'operation' is traditionally used for military-oriented aspects of security policy, while the notion of 'mission' is mainly used for civilian aspects of security policy as well as for military advisory and assistance tasks.

Hence the reason why the instrument of Joint Action⁹¹ is mainly used in the context of CSDP crisis management.⁹² This is an instrument mainly designed for operational actions in the CFSP/CSDP framework.⁹³ It therefore differs from the guideline-oriented Common Position defining the general approach.⁹⁴ As discussed in the previous Chapter,⁹⁵ the CFSP legal framework under which the CSDP operates requires a specific level of commitment from EU Member States. They are required to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity, and to refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.⁹⁶ But they are not compelled to adopt a common policy or to act.⁹⁷ In this regard, even the adoption of a common position defining a common approach does not import a legal obligation to adopt a Joint Action for an operational action. This is as true for the non-CSDP CSFP as the CSDP.⁹⁸ However, with specific regards to the CSDP, although the '[CSDP] *shall* provide the Union with an *operational* capacity drawing on civilian and military assets', the Union '*may*' use them on missions.⁹⁹

With specific regards to EU external action towards SSA, although it was not mentioned in the previous Chapter, it is particularly worth noting in this Chapter that the Union's commitment to conflict prevention and peace and security in general has always been qualified with the principle of African ownership.¹⁰⁰ Indeed, it is arguable that while this applies across the board,

91See Article 28 TEU; Article 25(b)(1).

92See 5.3.3. above.

93See Article 28 TEU; Article 25(b)(1).

94See 5.3.2. above; and also 6.3.1. above.

95 5.2.1.

96Article 24(3) TEU (ex-Article 11(2) TEU).

97See Wessel, fn 29, p 287.

98Indeed, it could be more the case in the latter due to the higher sensitivity to this aspect of security policy.

99Article 42(1) TEU.

100See the Cotonou Agreement; and also Preamble paragraph 1 of the Common Position on Conflict Prevention in Africa, fn 62 above.

it may be of greater import in the context of the CSDP. This is because of the controversial nature of military interventions in its different variations,¹⁰¹ and also the difficulties of the human resource capabilities required for the different aspects of CSDP crisis management¹⁰² including the military and civilian aspects.¹⁰³ Moreover, although the EU expresses its preparedness to become involved, whenever necessary, in crisis management in Africa with its own capabilities, notwithstanding its commitment to African ownership,¹⁰⁴ it equally confirms its recognition of the primary responsibility of the United Nations Security Council (UNSC) for the maintenance of international peace and security under the Charter of the United Nations.¹⁰⁵

Having said that, it is noteworthy that in general, Joint Action for 'operational action' is not scarce in EU external action towards SSA. In contrast, the EU has conducted a wide array of military and civilian operations in SSA,¹⁰⁶ sometimes in the same country if necessary.¹⁰⁷ For

101 Military intervention as a conflict resolution mechanism is always controversial due to the principle of national sovereignty (see for example, Zounmenou, D, 'Is a Military Intervention in Mali a Realistic Option?' 25 June 2012, ISS, Pretoria Office, available at

<https://www.issafrica.org/iss-today/is-a-military-intervention-in-mali-a-realistic-option>, accessed 15 December 2015).

102 See Hill, fn 24 above, on the 'capability-expectation gap'.

103 See 6.4.2. below. These are peculiar to the CSDP, and do not apply to the non-CSDP CFSP actions. It is important to note that although a mixed military-civil operation is possible in practice, this is not discussed further than the present mention as they are of no extra value to answering the research question. Moreover, there are difficulties with identifying what a mixed-instrument entails. For example, the only officially designated mixed civil-military operation is the EU civilian-military supporting action to the African Union mission in Darfur (see AMIS II Darfur, fn 45 above). However, EUSEC DRC and EU SSR Guinea Bissau (fn 45 above) have also been listed as mixed civilian-military operations by some sources (see for example the CSDP Handbook, fn 6 above, p 62; and Simon, L 'Command and Control? Planning for EU military Operations', *ISS Occasional Paper* January 2010, No 81, p 32; also see Piris, fn 22 above, p 270). Nevertheless, most sources regard these two as civilian operations by listing only AMIS II Darfur as a mixed civilian-military operation (see for example Hoffmeister, F, 'Inter-pillar coherence in the EU's civilian crisis management' in Blockmans, fn 7 above, p 176; Naert, F, 'Legal Aspects of EU Military Operations' (2011) 15 *JIP1*, p 218-242, at 218; also see Council website. Elsewhere in SSA, the EU has also conducted a CSDP SSR mission in Guinea Bissau which was not attached to any prior conflicts (see Council Joint Action 2008/112/CFSP, fn 45 above).

104 Article 1(3) of the Common Position on Conflict Prevention in Africa, fn 62 above.

105 Preamble paragraph 3 of the Common Position on Conflict Prevention in Africa, fn 62 above.

106 See for example, fn 45 above.

107 Naert, fn 71 above, p 95. Invariably, an operation can also cut across the different aspects of the tasks. Illustrative is Operation EUNAVFOR Somalia (see Council Joint Action 2008/851/CFSP fn 45 above). The aim of this operation includes contribution to the protection of vessels of the World Food Program (WFP) delivering

example, Operation *ARTEMIS* was followed by EU Police Mission in Kinshasa (EUPOL 'Kinshasa').¹⁰⁸ This was followed by an EU mission to provide advice and assistance for SSR in the DRC (EUSEC DR Congo).¹⁰⁹ This latter mission was eventually to run parallel with a subsequently launched EU Police Mission undertaken in the framework of SSR and its interface with the system of Justice in the DRC (EUPOL RD Congo).¹¹⁰ The synergy in sequencing these different dimensions would be coherence in action. However, as the Mali case study illustrates, the synergy in sequencing of policy actions available to resolve a conflict or crisis does not always happen. This could be due to some of the reasons mentioned above including the dearth of resources,¹¹¹ and 'capabilities-expectations gap'.¹¹² However, it could also be due to what Arbour refers to as the fear of intervention without an end,¹¹³ which could in the specific case of SSA may be underlined by a possible element of deference to Member States with pertinent historical affinity with the region.¹¹⁴ Of course, these are additional factors to the limitations caused by the operational flexibility of CSDP crisis management as will not be discussed.

6.4. Decision-making, implementation and enforcement of CSDP crisis management: the Member States or the Member States?

Similar to the previous Chapters in which other EU external policies have been analysed, this section discusses the decision-making, implementation and enforcement of CSDP crisis

food aid to displaced persons, contribution to the protection of vulnerable vessels cruising the Somali coast, and deterrence, prevention and repression of acts of piracy and robbery of the Somali coast.

108See Council Joint Action 2004/847/CFSP, fn 45 above.

109See Council Joint Action 2005/355/CFSP, fn 45 above.

110See Council Joint Action 2007/405/CFSP, fn 45 above.

111The strength of this point is however reduced in the light of the fact that the financial crisis had not started when the EU failed Darfur (see in general Okemuo, fn 37 above). For an analysis of the Darfur crisis see and the Union's failure to act see in general, Miller, L, and Bock, C, 'Again, Never: The EU's Failure to Act in Darfur', [2004] 2 *JEA* 4.

112See Hill, fn 24 above.

113See Arbour, L, '10 Conflicts to Watch in 2013' *Foreign Policy*, 27 December 2012.

114Based on the historical factors discussed in Chapter Two of this thesis (at 2.2.4.).

management.¹¹⁵ What will become apparent here is that the relevant institutions of decision-making and the mechanisms of implementation differ from those in the other areas of EU external action towards SSA analysed in the preceding Chapters of this thesis.¹¹⁶ Indeed, in contrast to the equally legalised high politics of the CFSP, the CSDP is distinctly specific even to the extent that the institutional flexibility and pragmatism used ameliorate the complex dynamics of EU external action is arguably inapplicable to CSDP crisis management in practice. The CSDP has a Crisis Management Procedure.¹¹⁷ Having said that, it is noteworthy that this will not be the main focus of this analysis. The reason is that this will not do more than further illustrate the specificity of CSDP crisis management which a simple discussion of the ordinary decision-making procedure of same illustrates. In this regard, the latter centres on the key institutional procedures leading to the adoption of a 'Decision' (formerly Joint Action) which is the legal instrument and core mandate for CSDP crisis management operation as discussed above. Similar to previous Chapters and in line with the aim of this thesis, special highlight is placed on the roles of the HR/VP and the EEAS at her service with a view to determining their

115As is already clear by now, this dimension of each policy is often globally applicable and will sometimes only be different with reference to Council working Groups which can sometimes be geographical.

116See Chapter Three of this thesis at 3.4. and Chapter Four of this thesis at 4.4. for decision-making in relation to development policy and trade policy under the Cotonou Agreement; and also Chapter Five at 5.4. in relation to the wider CFSP. Indeed, although the minimal roles of the Commission, the European Parliament (EP), and the ECJ in the CFSP in contrast to the non-CFSP external action has been discussed in Chapter Five (at 5.4. above), this still significantly differs from what obtains in the CSDP except for the post-Lisbon role of the EP in the CFSP and CSDP which are exactly same (see Chapter Five of this thesis at 5.4.1., in particular fn 171). Similar to the CFSP, post-Lisbon, the EP may ask questions and make recommendations to the Council and to the HR/VP on the main aspects of the CSDP pursuant to Article 36 TEU (see further Chapter Five at 5.4.1, in particular fn 171. The references to CFSP therein simply need to be changed to reflect the CSDP).

117See 'Suggestions for procedures for coherent, comprehensive EU crisis management' Council Doc. 11127/03 of 3 of July 2003; and also the 'EU Concept for Military Planning at the Political and Strategic Level', Council Doc. 10687/08 of 16 June 2008. This can be divided into three phases: (1) the development of a crisis management concept (CMC), (2) the development of strategic options, and (3) the development of concrete operational planning (see 'The European Security and Defence Policy (ESDP): Decision-making, Planning and Organisation of ESDP Field Missions, (2007), Centre for International Peace Operations (ZIF) Updated interactive guide, available at <http://www.zif-berlin.org/en/home.html>, accessed 12 September 2009; and for further discussion of the procedure albeit not divided into phases see Duke, S, Peculiarities in the Institutionalisation of the CFSP and ESDP, in Blockmans, fn 7 above, p 80; and Lindstrom, G, 'Enter the EU Battle groups' *Chaillot Paper*, February 2007, No 77, p 19-21; also see the CSDP Handbook, fn 6 above, p 59-61 where the same procedure is offered albeit broken down into six phases.

added value in enhancing coherence post-Lisbon. In the light of the institutional specificity of the CSDP, the highlight on the roles of the HR/VP and the EEAS and their added value to coherence is discussed under a distinct sub-heading.¹¹⁸

6.4.1. CSDP crisis management decision-making

As indicated in the previous Chapter on the CFSP, although the European Council is the *de jure* and *de facto* apex institution in EU policy formulation, it does not play any direct role in terms of the adoption of legal instruments.¹¹⁹ It also does not play any direct or formally recognised role in crisis management decision-making.¹²⁰ In contrast, the Council is expressly responsible for adopting decisions relating to the Petersberg Tasks, defining their objectives and scope and the general conditions for their implementation.¹²¹ In so far as these are decisions relating to operational action by the Union, they are adopted in accordance with the Council's general decision-making power for Joint Actions. It is the latter which embodies the mandate and also brings them into legal effect pursuant to Article 28 TEU.¹²² In this regard, the institutional procedure for the CFSP as discussed in Chapter Five would apply to a certain degree. For example, the relevant post-Lisbon Council configuration is still the Foreign Affairs Council (FAC) as chaired by the HR/VP.¹²³ Of course, as discussed in the previous Chapter,¹²⁴ this does

¹¹⁸See 6.4.2. above. This is separate from the discussion of decision-making and implementing procedures and strategically placed between the two for better analytical flow.

¹¹⁹See Chapter Five of this thesis at 5.4.1. fn 163.

¹²⁰This rarely climb the decision-making ladder up to the level of the Heads of State and Government sitting in the European Council (Grevi, G, 'ESDP Institutions', in Grevi, fn 23 above, p 24). Of course, they are *ad hoc*. Contrastingly, the construction of the CSDP as an integral but distinct part of the CFSP as well as the attendant distinct institutional logic is attributed solely to the European Council (see Eeckhout, P, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, 2004), p 410).

¹²¹Article 43(2) TEU.

¹²²See 6.3.2. above.

¹²³Article 16(6) TEU; also see Chapter Five of this thesis at 5.4.1.; and Chapter Two at 2.5.3.2.

¹²⁴At 5.4.1.

not mean that the HR/VP has any decision-making power,¹²⁵ beyond her legal power to make proposals¹²⁶ which she shares in the CSDP with Member States.¹²⁷ Nevertheless, it is arguable that such a position of general oversight would enable the HR/VP to play the role of a policy shaper and informed coordinator for coherence. In this regard, although the *ad hoc* nature of the CSDP means that policy coherence for development may not reasonably be substantially accommodated in the course of the decision-making for CSDP crisis management, the HR/VP could still persuade the Council to act based on this argument. In general, there is little or no doubt that inaction in this field as may be required for example in the context of EU external action in SSA, would amount to disregard for policy coherence for development.¹²⁸ Of course, this is not to deny that the success of her influence will depend on the political will of the Member States who through the Council are at the heart of the EU's general 'capacity to decide'¹²⁹ on CSDP crisis management. Indeed, at all times, the decision for a CSDP crisis management rests completely on EU Member States. This is not solely because the Council who is the decision-maker represents the Member States. Even Committees that support the

125See Erkelens, L, and Blockmans, S, 'Setting up the European External Action Service: An Institutional Act of Balance', *CLEER Working Papers* 2012/1, p 13 where it is rightly argued that the HR/VP is not a member of the Council, and accordingly does not play any part in the Council's decision-making.

126Article 42(4) TEU.

127Article 42(4) TEU indicates that CSDP decisions including those initiating a mission shall be adopted on a proposal from the HR/VP or an initiative from a Member State (see for example Duke, S, and Vanhoonacker, S, 'Administrative Governance in CFSP', (2006) *EFA Rev.* p 163-182 at 166; and Bjorkdahl, A, and Stromvik, M, 'The Decision-making process behind launching an ESDP Crisis Management Operation' DIIS *Brief*, April 2008, p 1). However, in general, crisis identification can arise from thematic or geographic Council Working Groups (CWG). For example, in the context of EU external action towards SSA, the Council Working Group for Africa (generally known by its french acronym COAFR) propose a CSDP crisis management (see CSDP Handbook, fn 6 above, p 60). On COAFR, see www.se2009.eu/en/meetings_news/2009/7/8/africa_working_party_coafr.html, accessed December 29, 2011). COAFR which is now a part of the EEAS Africa geographical desk is responsible for monitoring and analysing developments in SSA with regards to horizontal issues such as conflict prevention, conflict management, democracy and human rights under the wider CFSP. This is interlinked with the CSDP as crisis management under this framework can actually begin with identification by COAFR. This will not detract from the implementing mandate of COAFR under the Action Plan for ESDP support to Peace and Security in Africa, namely that of political dialogue for peace and security with African organisations and African States (see Doc. 10538/4/04, fn 74 above; and Chapter Seven of this thesis). Indeed, it is arguable that the political dialogue role of COAFR will assist its early warning role for other means of crisis identification.

128See 6.5. below; and further, Chapter Eight of this thesis.

129See Grevi, fn 120 above, p 26.

Council's work in this field are 'Brusselised' national institutions¹³⁰ functioning in a 'transgovernmental' dynamics.¹³¹ The latter which goes beyond the intergovernmental approach that revolves around relevant traditional EU institutions is one major illustration of the specificity of the CSDP.

In contrast to the non-CSDP CFSP external action where there is controversy regarding the highest council preparatory body,¹³² the most prominent of the Council preparatory bodies for CSDP crisis management decisions is certainly the Political and Security Committee (PSC).¹³³ In contrast to COREPER, the PSC never takes the final decisions in the CSDP, but nevertheless plays a central role in the decision-making. Indeed, in practice, it acts beyond the role of a mere preparatory body and has been described as the 'linchpin' of the CSDP.¹³⁴ In fact, in practice, it is the PSC that deliberates on whether EU action is appropriate following the identification of

130The concept of 'Brusselisations' means the locating of the relevant institutions and structure in Brussels far away from the Member State capitals (see for example Juncos, A and Reynolds, C, 'The Political and Security Committee: Governing in the Shadow', [2007] *EFA Rev.* p 127-147 at 135: 'Brusselising [...] means that while the relevant competencies do remain ultimately at the disposal of the Member States, the formulation and implementation of policy will be increasingly *Europeanised* and *Brusselised* by functionaries and services housed permanently at Brussels').

131In a transgovernmental process, national representatives spend more time with their counterparts from other representations than those of their own (see Davis Cross, M, 'Cooperation by Committee: the EU Military Committee and the Committee for Civilian Crisis Management' ISS *Occasional Paper* 82, February 2010, p 4; also see Juncos and Reynolds, fn 130 above, p 145 where they suggest that the process of 'Brusselisation' transcends an intergovernmentalist approach. However, also see De Baere, G, *Constitutional Principles of EU External Relations* (OUP, 2008), p 225, where he attributes 'intensive trans-governmentalism' to the CFSP in general.

132See Chapter Five of this thesis at 5.4.1.

133As will be remembered from the previous Chapter (see 5.4.1. above), this Committee (also known by its French acronym, the COPS) is comprised of national senior representatives at ambassadorial level). It was established under Council Decision 2001/78/CFSP [2001] *OJ L27/1*. Indeed, even if the controversy regarding the role of the PSC and the Committee of Permanent Representatives (COREPER) rolls into the CSDP, still it has been suggested that the often overloaded agenda of COREPER has meant that the PSC is the *de facto* highest administrative body in the CSDP (see Vanhoonacker, S, *et al*, 'Understanding the Role of Bureaucracy in the European Security and Defence Policy: the State of the Art' [2010] 14 *EIOP*, p 9; and De Baere fn 131 above, p 133). In fact, in one pertinent analysis on the institutional dynamics of CSDP crisis management decision-making, COREPER was not at all mentioned (see Lindstrom, fn 117 above).

134Duke, S, 'The Linchpin COPS: Assessing the Workings and Institutional Relations of the Political and Security Committee', EIPA Working Paper (EIPA 2005), available at http://www.eipa.eu/files/repository/product/20070815142132_FC0505e.pdf, accessed 06 January 2011. The PSC has also been described as the 'workhorse in ESDP decision-shaping' Meyer, C, *The Quest for a European Strategic Culture: Changing Norms on Security and Defence in the European Union* (Basingstoke: Palgrave Macmillan, 2006), 116. and also across the wider CFSP wherein it is regarded as the backbone of foreign policy co-ordination in general (Peers, S, 'Common Foreign and Security Policy' [1997] 17 *YEL* 546, at 551).

a crisis.¹³⁵ In doing this, the PSC is directly supported by two advisory bodies namely the EU Military Committee (EUMC)¹³⁶ and the Committee for Civilian Aspects of Crisis Management (CIVCOM).¹³⁷ The EUMC is composed of national Chiefs of Defence Staff (CHODS) of Member States meeting at the level of their military representatives. It gives advice and makes recommendations to the PSC on all military matters within the EU with the support of the European Union Military Staff (EUMS).¹³⁸ The EUMS is also composed of military experts seconded by the Member States.¹³⁹ In parallel, CIVCOM which is equally composed of national officials representing the Member States provides advice and recommendations on the civilian aspects of crisis management.¹⁴⁰ A civilian Crisis Management and Planning Directorate (CMPD)¹⁴¹ supported by a Civilian Planning and Conduct Capability (CPCC)¹⁴² was created to improve civilian-military coordination within the CSDP framework as part of the comprehensive approach to crisis management.¹⁴³ The PSC also relies on this Directorate for

¹³⁵See fn 127 above.

¹³⁶Council Decision 2001/79/CFSP [2001] *OJ L*27/4.

¹³⁷Council Decision 2000/354/CFSP [2000] *OJ L*127/1.

¹³⁸Council Decisions 2001/80/CFSP as amended by 2005/395/CFSP [2005] *OJ L*132/17.

¹³⁹It provides expert military advice to the EUMC and is also responsible for the performance of early warning, situation assessment and strategic planning for the Petersberg Tasks.

¹⁴⁰Council Decision 2000/354/CFSP [2000] *OJ L*127/1.

¹⁴¹Formerly the Civilian-Military Cell (Civ-Mil Cell) established within the EUMS to facilitate operational and strategic planning for joint civil-military dimension of crisis management (Presidency Conclusions, Brussels European Council, 12-13 December 2003, 5381/04, para 90); it also incorporates the former security and defense aspect of the CGS Directorate-General for External and Politico-Military Affairs (DG E) namely the Defense Directorate (DG E VIII) and the Directorate for Civilian Crisis-Management (DG E IX) (Simon, fn 103 above, p 25–26).

¹⁴²As discussed below (at 6.4.2.), the CPCC which was established in 2007 is also an implementing organ for civilian crisis management within the CGS; nevertheless, it took over the operational planning of the former Civilian Crisis Management and Coordination (CCMC) which included a Crisis Response and Co-ordination Team – (CRCT) (see ‘The European Security and Defence Policy (ESDP): Decision-making, Planning and Organisation of ESDP Field Missions, (2007), Centre for International Peace Operations (ZIF) updated interactive guide, available at <http://www.zif-berlin.org/en/home.html>, accessed 12 September 2009).

¹⁴³Prior to the CPMD, there was only a Civil-Military Coordination (CMCO) (see Council of the European Union Civil Military Co-ordination, Doc. 14457/03, Brussels, November, 7 2003, para 11); also see CSDP Handbook, fn 6 above, p 60; and Simon, fn 103 above, p 26 where he explains that: ‘the added value of the CMPD would be the increased comprehensiveness of the CMC product; the new directorate will have a military angle, a police angle, a rule-of-law angle, a development angle, etc.’ These differ from the concept of Civil Military Cooperation (CIMIC) which is primarily related to cooperation between the EU and other relevant parties in the field (see Khol, R, ‘Civil-Military Coordination in EU Crisis Management’ in Nowak, A, (ed.) ‘Civilian Crisis Management: the EU Way’, ISS *Chaillot Paper* No 90, June 2006, p125). Of course, the latter is outside the scope of this thesis.

the development of a Crisis Management Concept once it decides that an EU action is appropriate. The latter is a planning document and a conceptual framework describing the overall approach of the EU to the management of a particular crisis.¹⁴⁴ In this regard, it is intended to contribute to the coherence of EU action, even though this may be limited to the CSDP framework.¹⁴⁵ The PSC evaluates all strategic options¹⁴⁶ and then forwards its decisions on them to the Council. It is at this juncture that the Council formally decides on and adopts the Decision (or Joint Action) for CSDP crisis management.¹⁴⁷ This Decision is made by unanimity,¹⁴⁸ a potentially uphill task especially in the specific context of the CSDP due to some of the factors discussed above. Illustrative is the Mali case study as discussed below.¹⁴⁹

144European Union Concept for Military Planning at the Political and Strategic Level', Council Doc 10687/08, Brussels, 16 June 2008, p 10; also see CSDP Handbook, fn 6 above, p 60 where the Crisis Management Concept is described as a planning document containing the aims and final objective, together with the major politico-strategic options for responding to that particular crisis, including the possible exit strategy.

145See the previous page on the description of the role of the CMPD. Indeed, although the CMPD is comprehensive in its approach to the Crisis Management Concept (see fn 144 above), it is not specifically tasked with coherence between the CDSP and other fields of EU external action. On the latter, see below.

146Once the PSC agrees the Crisis Management Concept and the Council approves it, the PSC embarks on the development of strategic options at the request of the Council. The PSC does this by tasking the EUMC to prepare the Military Strategic Options (MSO) and the CIVCOM to prepare the Civilian Strategic Options (CSO) or Police Strategic Options (PSO). For the purposes of mixed-civil-military missions, the PSC also avails itself of the advisory services of the CMPD. In principle, the Commission is meant to present its own accompanying measure to the PSC at this stage to be taken into account. However, whether this applies in practice is difficult to say especially in the post-Lisbon era (the Commission is no longer associated to the CFSP like was the case pre-Lisbon).

147It codifies, *inter alia*, the mandate, its objectives, the scope of the implementing decisions (if any) to be made by the PSC, the financing arrangement, the chain of command, and the operational headquarters (OHQ). Having said that, it is noteworthy that the CSDP procedure is not always strictly followed (see for example, CSDP Handbook, fn 6 above, p 62 for an example of a skipped stage during the plan for Operation ARTEMIS (fn 45 above); and also Major, C, 'EU-UN Cooperation in Military Crisis Management: the Experience of EUFOR DR Congo in 2006' ISS *Occasional Paper* No. 72, September 2008, p 17; and Fritsch, H, 'EUFOR DR Congo: A Misunderstood Operation?' CIR, Queens University, Ontario, 2008, p 32, for the stage that was skipped during operation *EUFOR DR Congo* (fn 45).

148Article 42(4) TEU and 31(4) TEU. However, under the CFSP legal framework in general, there is a provision for constructive abstention by which a Member State can abstain from voting and yet not oppose further step towards the necessary action by virtue of Article 31(1) TEU. Such Member State shall not be obliged to apply the decision, but shall accept that the decision commits the Union (see Jaeger, T, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy' (2002) *EFAR* 297-316, at 320; and Galloway, D, *The Treaty of Nice and Beyond* (Sheffield: Sheffield Academic Press, 2001), p134-6.

149See 6.5. below.

6.4.2. Of the HR/VP and the EEAS and their added value to coherence as it relates to the CSDP

The above analysis, is the decision-making procedure for CSDP crisis management post as pre-Lisbon. However, the post-Lisbon dimension bears the involvement of the HR/VP and the EEAS in varying forms even if only lightly. The focus of this section is to highlight their roles and the added value they bring to enhancing the coherence of EU external action. In this regard, the above analysis illustrate that both the HR/VP and the EEAS do not have any direct roles in the decision-making for CSDP crisis management post-Lisbon. Rather, similar to the Chair role of the HR/VP in the Council as discussed above, some relevant Council preparatory Committees and working groups are also chaired by representatives of the HR/VP appointed from the EEAS. These include the PSC, the CIVCOM, and with specific regards to EU external action towards SSA, the Working Group for Africa (CAOFR). Of course, similar to the Chair role of the HR/VP in the Council, the potential of the Chairs from the EEAS to contribute to the enhancement of coherence would be informal in this regard. In fact, in the light of the *ad hoc* nature of the CSDP crisis management, it can be argued that the reference to coherence in this context may be needless. This is because the question of the substantial accommodation of policy coherence for development does not arise even as a *façon de parler*¹⁵⁰ with regards to the strictly short term *ad hoc* CSDP measures. Although this does not negate the potential implications of a lack of synergy in the sequencing of policy options that are available to resolve a crisis on this requirement.¹⁵¹ In this regard, it is noteworthy that although there is a conceptual overlap between the scope of the Civilian Aspects of Crisis Management under the CSDP, and the security aspects of EU development policy, the two are functionally different.¹⁵² Ultimately,

¹⁵⁰See Chapter Five of this thesis.

¹⁵¹That is, policy coherence for development.

¹⁵²The latter is functionally funding-oriented (see Chapter Three of this thesis).

what is important is coherence based on the construction of a united whole *vis-a-vis* synergy in the sequencing of policy options towards the achievement of an end. In this regard, CIVCOM is responsible for coherence between crisis management under the CSDP framework and the crisis management measures implemented by the Commission under development cooperation policy.¹⁵³ Although its success in this regard in the pre-Lisbon era is doubtful in the light of available evidence,¹⁵⁴ it can be argued that the post-Lisbon Chair of CIVCOM by a representative of the HR/VP¹⁵⁵ may help to address the pre-Lisbon linkage shortfall between the CSDP and development policy.¹⁵⁶ Alternatively, it could nevertheless be argued that the civilian aspects of crisis management is being taken over by the EEAS in practice and is now mainly conducted under the post-Lisbon comprehensive security-development instrument.¹⁵⁷ Illustrative is the EU Strategy for the Sahel as discussed in the previous Chapter.¹⁵⁸ In general, the EU Member States appear to be taking back the turf in the field of EU foreign and security policy in a strict sense. In any event, as the Mali case study illustrates, it is not actually the turf battles that constitute the most visible and dangerous threat to coherence based on the construction of a united whole. Rather, it is the lack of synergy in the sequencing of policy options that are available for achieving policy ends, say for example, the resolution of conflicts or crisis as was recently the case in Mali. The former which revolves around institutional interaction could readily be addressed with effective institutional dialogue and coordination in the spirit of *tous pour un, un pour tous*.¹⁵⁹ In contrast, the latter which revolves around issues

153Guide De La PESD – RPUE – Représentation Permanente De La France Auprès De l’Union Européenne, p 24–25.

154See Development Assistance Committee (DAC), ‘Peer Review: European Community’, Organisation for Economic Cooperation and Development (OECD), Paris, 2007, p 66 -71 on the limited coherence between the Common Security and Defence (CSDP) and longer term development programming’; and also CEC, ‘Development Policy in the Run Up to 2000’, SEC (92) 915 final, Brussels, p 42.

155See Doc. 11903/11, fn 117 above.

156See fn 154 above.

157See for example Chapter Five of this thesis at 5.3.3.

158Ibid.

159Hillion, C, ‘*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union’ in

of human and material resources as well as the political will of the Member States, is the major threat. This is because it could lead to inaction to the detriment of the overall effectiveness of EU external action towards a region or country. For example, in the context of EU external action where violent conflicts do not only set development backwards in general, but also sets back the effects of EU development policy in particular, CSDP inaction is particularly detrimental to the latter. Having said that, it is noteworthy that inaction is mainly witnessed in the military aspect of the CSDP crisis management which arguably lies at the heart of the specificity of CSDP crisis management. In fact, the Chair role of the representatives of the HR/VP in some CSDP institutions does not extend to the EUMC which continues to be chaired by an elected Chair post as pre-Lisbon.¹⁶⁰ In this way, the distinct nature of the military aspects of crisis management is maintained. Significantly, there also appears to be a gradual militarisation of CSDP crisis management especially with the practice of mixed civilian-military operations.¹⁶¹ Whether this was originally intended is difficult to say. However, it is clear that the CSDP is generally expressly excluded from the areas in which the EEAS and the Commission are required to consult each other in the exercise of their respective functions.¹⁶² Rather, the EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area.¹⁶³ The meaning of this is hard to determine especially in the light of the fact that the EEAS is tasked with supporting and cooperating with the Commission Services in order to ensure the coherence of EU external action.¹⁶⁴ Overall, the potentials for the HR/VP and the EEAS to enhance coherence as it relates to the CSDP may be quite limited in the light of the specificity of the CSDP. Even within the EEAS, the CSDP

Cremona, M, (ed.), *Developments in EU External Relations Law* (OUP, 2008).

¹⁶⁰Ibid.

¹⁶¹See above.

¹⁶²EEAS Decision Article 3(2).

¹⁶³Ibid.

¹⁶⁴EEAS Decision Article 3(2).

support structures do not have a link to the rest of the EEAS even though they are under the direct authority and responsibility of the HR/VP.¹⁶⁵

6.4.3. Implementation

The implementation of CSDP crisis management decisions at the strategic level following a Decision or Joint Action is the responsibility of the PSC under the supervision of the Council and the HR/VP.¹⁶⁶ The PSC provides the political and strategic guidance for the stages preceding the launch of the operation, and for the duration of the operation.¹⁶⁷ This applies to both the civilian and military aspects of crisis management.

Otherwise, the Member States bear the responsibility for implementing the CSDP crisis management and provides the required capabilities for the civilian and military assets pursuant to Article 42(1) TEU.¹⁶⁸ But for both, there are no agreed fixed resources or structures for crisis management. This state of affairs which dates back to the evolution of the military aspects of crisis management and the failed ERRF¹⁶⁹ continues to be the case even after the subsequent Headline Goals 2010 covering both military and civilian aspects of crisis management. The

165See Vanhoonacker, S, *et al*, 'Understanding the Role of Bureaucracy in the European Security and Defence Policy: the State of the Art' (2010) 14 *EIOP*, p 10; and more specifically the EEAS organisational Chart (available at http://eeas.europa.eu/background/docs/organisation_en.pdf, accessed 12 February 2016).

166Article 38 TEU; also as will be recalled, the Council may, and usually authorises the PSC, by means of the Decision (formerly Joint Action) for the purpose and for the duration of a crisis management operation, to make relevant decisions concerning the political control and strategic direction of the operation pursuant to Article 38 TEU; However, the powers of decision with respect to the objectives and termination of the EU military mission always remains vested in the Council.

167Political and strategic direction usually entails general strategic and political decisions as authorised by the Council in the instrument of Decision (formerly Joint Action) or subsequently (See Naert, fn 71 above, p 100). The EUSR ensures visibility for Union support to crisis management and conflict prevention (see Article 3(1)(c) Council Decision (CFSP) 2015/2274 of 7 December 2015 appointing the European Union Special Representative for the Sahel [2015] *OJL*322/44.

168This is the case in practice even though the Treaties provide that the HR/VP 'may propose the use of both national resources and Union instruments, together with the Commission where appropriate' (Article 42(4) TEU).

169See 6.1. above.

result is resort to *ad hoc* voluntarism based on the voluntary commitments of EU Member States in the context of civilian crisis management,¹⁷⁰ and varying flexible arrangements for the military aspects of crisis management.¹⁷¹ In practice, the former appears more successful than the latter. This is understandable in the light of the limiting factors discussed above in relation to military-oriented operations such as peacekeeping and the other original Petersberg Tasks. Of course, these are different from the subsequently developed military-oriented technical and advisory aspects of the CSDP crisis management. These which are arguably closer to the civilian crisis management than the core military aspects of crisis management, also appears to be less controversial than the latter, and are therefore understandably more successful. Illustrative of these is the Mali study. Furthermore, as the Mali case study further illustrates, the limiting factors discussed above means that sometimes the question of resort to the flexible mechanisms of the core military aspect of CSDP crisis management does not arise as an agreement on a decision for a Joint Action cannot be reached. For example, there is the mechanism of a Framework Nation by which a Member State would volunteer to have specific responsibilities in an EU operation¹⁷² especially with regards to the provision of an Operational Headquarters (OHQ)¹⁷³ and perhaps a significant contribution of forces¹⁷⁴ and the overall

170See for example European Union, European Security and Defence Policy, 'European security and defence policy: the civilian aspects of crisis management', available at http://www.consilium.europa.eu/uedocs/cmsUpload/090702%20Civilian%20aspects%20of%20crisis%20management%20-%20version%203_EN.pdf, accessed 12 January 2016.

171For a list of troop contributions by EU Member States towards EU civilian and military operations see Multilateral Peace Missions Overview available at http://conflict.sipri.org/SIPRI_Internet/index.php4, accessed 31 January 2012.

172European Union Operations Chains of Command, Information Report, Doc A/2009, available at http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2008/2009.php, accessed 20 December 2011.

173Ibid, Alternatively, the EU can activate its Operations Centre in the EUMS to plan and conduct an autonomous EU operation when no national OHQs have been identified (CSDP Handbook, fn 6 above, p 62); also see for example, EU OpCen for the Horn of Africa which was activated in 2012 in the context of the Strategic Framework for the Horn of Africa (see Council of the European Union At the 3142nd Council meeting on Foreign Affairs in Brussels, Doc 5592/12, 23 January 2012).

174Ibid. First used for Operation *ARTEMIS* in SSA, the concept of Framework Nation was adopted in 22 July 2002 'as the conceptual basis for conducting autonomous operations with recourse to a Framework Nation' (Duke, fn 18 above, p 404). There are so far five voluntary Framework Nations for EU crisis management, namely

financing of the operation.¹⁷⁵ A Framework Nation can also double as a Battle Group or avail itself of the mechanism of Battle Group and vice versa.¹⁷⁶ The mechanism of Battle Group entails the formation of 'battle groups' within the national armed forces of the Member States to be made available to the EU whenever the need arises.¹⁷⁷ In any event, these neither allude to an independent operation, nor do they pre-empt a decision. In contrast, they follow a decision for a CSDP crisis management and must therefore be based on a decision that has been unanimously adopted by the Council. The same goes for the post-Lisbon 'group of the willing and capable' under which the Council can entrust the implementation of a crisis management task to a group of capable and willing Member States.¹⁷⁸ Where this is the case, those Member States in association with the HR/VP shall agree among themselves on the management of the task pursuant to Article 44(2) TEU. Essentially, it may be taken for granted that there are always one or more EU Member States that are often ready to volunteer for CSDP crisis management revolving around a military operation such as peacekeeping. However, they would still require the agreement of other EU Member States demonstrated by a unanimous decision, and this is the tough bit which usually forestalls a CSDP crisis management as may be required. Illustrative is the Mali case study.

Germany, France, Italy, Greece and Britain. The respective headquarters are OHQ - Potsdam, OHQ - Mont-Valerien (Paris), OHQ - Centocelle (Rome), OHQ - Larissa, OHQ - Northwood (London) (see European Union Operations Chains of Command, Information Report, Doc A/2009, available at http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2008/2009.php, accessed 20 December 2011). For example, France was the Framework Nation for Operation *ARTEMIS* and EUFOR Tchad/CAR.

¹⁷⁵Ibid.

¹⁷⁶The two are not mutually exclusive and Battle Groups are not excluded from using the OHQs provided by the Framework Nations (see Lindstrom, fn 117 above, p14). A Battle Group can be composed of one or any number of EU Member States. Although many Battle Groups have been formed and continue to be formed in an ongoing process. Nevertheless, none have so far been used in practice in SSA or elsewhere.

¹⁷⁷GAERC, Brussels, 22 March, 2004, 'The Battle groups Concepts, UK/France/Germany Food for Thought Paper, 10 February, 2004, in 'EU Security and Defence: Core Documents, Vol V *Chaillot paper* 2005 No 75.

¹⁷⁸Article 44 TEU. These and the other mechanisms are different from the 'permanent structured co-operation' provided for in Article 42(6) TEU at Lisbon (also see Article 46 TEU; and Protocol (No.10) annexed to the Treaties).

6.5. Mali case study

In line with the previous Chapters on other fields of EU external action, this section discusses Mali as a case study for the conduct of CSDP crisis management in SSA on the back of the framework of CSDP crisis management discussed above. This is with a view to determining the overall coherence of EU policies towards SSA in general, and perhaps policy coherence for development in the same context.¹⁷⁹

It is noteworthy that this case study is unavoidably even a shorter case study in comparison with the short CFSP case study discussed in the previous Chapter.¹⁸⁰ This is because some of the aspects of Mali crisis, its evolutionary background and the EU's role therein has been set out in that Chapter¹⁸¹ and does not need to be repeated here in its entirety.

6.5.1. CSDP crisis management in Mali: a pertinent background

Without needing to repeat the contextual background of the Mali crisis here, the analysis would inevitably start with the immediate pertinent background to the requirement of the CSDP crisis management in Mali. In this regard, it will be recalled that following the intensification of conflict on the back of the foiled military coup in Mali in March 2012, the interim government of Mali on 1st September 2012 requested the assistance of the Economic Community of West African States (ECOWAS) in combating the insurgents and also terrorism. This was followed by successive requests by both the interim Government of Mali and ECOWAS for the support

¹⁷⁹However, see the discussion at 6.3. above on the view that the question of policy coherence for development in the context of the CSDP is entirely a different matter from what it is in the context of the CFSP in the light of the *ad hoc* nature of CSDP crisis management.

¹⁸⁰See Chapter Five of this thesis at 5.5.

¹⁸¹*Ibid.*

of the international community which eventually got the attention of the UN. The requests were for an UNSC resolution authorising an international military stabilisation force to assist the armed forces of Mali acting under Chapter VII as provided by the UN Charter.¹⁸² As will be recalled from above,¹⁸³ the primary responsibility for the maintenance of world peace lies with the UN and the UNSC. In response to the joint call by the interim Government of Mali and ECOWAS, the UNSC on October 12 2012, unanimously adopted at the first instance the UNSC Resolution 2071. This was an authorisation for ECOWAS and the Africa Union (AU) as the key regional and African continental security mechanisms respectively, to develop a plan for military intervention in Mali. They were to report back to the UNSC on this within 45 days.¹⁸⁴ This Resolution also included a call for the international community including international organisations such as the EU¹⁸⁵ to become involved in the bid to resolve conflict.¹⁸⁶ On October 15 2012, the EU Foreign Affairs Council (FAC) concluded, *inter alia*, that the EU was convinced of the need for a rapid response to the security challenges and terrorist threat in Mali within a framework to be defined by the United Nations Security Council [UNSC].¹⁸⁷ This was the background to the EU's response, even if limited, to the Mali crisis under the CSDP framework as will now be discussed.

6.5.2. The EU's response to the Mali crisis: between the advisory and technical aspects of crisis management tasks and CSDP military operation

Almost immediately following the call on the international community by the UN, the EU

¹⁸²See Security Council, Resolution S/RES/2071 (2012), adopted by the Security Council at its 6846th meeting, on 12 October 2012.

¹⁸³At 6.3.2.

¹⁸⁴*Ibid*, para 7.

¹⁸⁵As indicated above in Chapter Two of this thesis (at 2.3.1.), the question of whether the EU is an international organisation is controversial. It is also outside the scope of this thesis.

¹⁸⁶*Ibid*, para 9.

¹⁸⁷See Council of the European union, Council Conclusions on the situation in Mali 3191st Foreign Affairs Council, Meeting, Luxembourg, 15 October 2012, para 5, 6th indent [author's emphasis].

embarked on the plan for a EU Training Mission (EUTM)¹⁸⁸ to provide training and advice to the Malian armed forces. The EU expressly reckoned that the developments might have a spill-over effect on neighbouring countries and compromise lasting peace and development throughout the Sahel. Furthermore, the EU also recognised that the situation increased the threat to the safety of the EU's citizens in the Sahel as well as in Europe. Moreover, the situation equally posed a direct threat to the EU's strategic interests including the security of energy supply and the fight against human and drugs trafficking.¹⁸⁹ These were clearly contrary to the development and security objectives expressed in the relevant instruments of the EU's external relations and objectives discussed in Chapters Two and Three of this thesis.¹⁹⁰ The EU clearly demonstrated its commitment by embarking on the plan to deploy a EUTM.¹⁹¹ However, while this plan was still in the works, there was further escalation of violence as the combat units from the insurgents which previously operated in the North¹⁹² moved down South with threats of further spread. Against this background, the UN adopted Resolution 2085 (on 20 December 2012) authorising the deployment of an African-led International Support Mission to Mali (AFISMA).¹⁹³ This Resolution also issued a similar call to the one in Resolution 2071 cited above. As terror continued to be unleashed aggressively and progressively in the face of all authorised plans, repelling the insurgents became a matter of emergency. Consequently, on 10 January 2013, the UNSC issued a Press Statement calling for a rapid deployment of AFISMA

188European Union External Action, Common Security and Defence Policy (CSDP), EU Training Mission in Mali (EUTM Mali), EUTM, Mali/1, January 13; Council Decision 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) [2013] *OJ L14/19*, p 1.

189Ibid.

190See respectively Chapter Two of this thesis at 2.4.; and Chapter Three at 3.2.

191Previously, it had also deployed EUCAP Sahel Niger, a civilian mission launched in the summer of 2012 in order to improve the capacities of Nigerian Security Forces to fight terrorism and organised crime (Council Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger) [2012] *OJ L187/48*).

192See Chapter Five of this thesis at 5.5.1.

193Okemuo, fn 37 above.

and equally reiterating its call to Member States to assist the settlement of the Mali crisis.¹⁹⁴ However, while the EU was quick to respond with a decision to send a EUTM to Mali during the less aggressive stage of the conflict, it did not maintain this response reflex at this latter and more aggressive stage of the conflict. In particular, it is arguable that the EU's response-reflex to the call for a military bridging operation prior to the arrival of AFISMA was inert. This is not to say that the EU did not make any positive move following the intensification of the conflict and the adoption of Resolution 2085. Indeed, the EU promised to accelerate preparations for the deployment of the EUTM. Nevertheless, the EUTM is not the same as a military bridging operation which was required for peacekeeping prior to the arrival of AFISMA. For example, the EUTM is a military advice and assistance task which is deployed for training purposes. While this would be necessary at early stage of a conflict or as post-conflict project, it cannot substitute for a task of combat forces in crisis management. The latter is required for peacekeeping as was required pending the arrival of AFISMA. There was a clear request for assistance from the Union's African partners as represented by Mali's President, supported by ECOWAS and the AU.

In the face of the EU's inertia, France responded to the call and on 11 January 2013 deployed a combined land and air forces (*Operation Serval*) to Mali as a bridging operation pending the deployment of AFISMA. The Permanent Representative of France informed the UNSC that France had answered to the request for military assistance issued by the Malian authorities by providing, within the bounds of international law, the support of its armed forces to the Malian units engaged in the fight against terrorist groups.¹⁹⁵ He rightly pointed out that the evolution

¹⁹⁴Security Council Press Statement on Mali, SC/10878 AFR/2502.

¹⁹⁵Okemuo, fn 37 above.

of the situation justified the acceleration of the implementation of Resolution 2085 which includes the deployment of AFISMA.¹⁹⁶ France did not give any explanation for why it was going it *cavalier seul* rather than within the EU framework. In the same vein, the EU did not give any indication as to why it would not act in this instance despite its commitments to African crisis management.¹⁹⁷ It is noteworthy that some EU Member States (including Belgium, Denmark and the UK) provided military logistic support to France.¹⁹⁸ This may raise the question whether these Member States would not have contributed to an EU military operation in Mali. However, even if this were answered in the affirmative, it does not presuppose that a unanimous decision for a CSDP military operation would have been achieved. As indicated above,¹⁹⁹ while unanimity is difficult to achieve, it is more so in the specific context of the CSDP due to some of the factors discussed above.

In general, as discussed in the previous Chapter, it may be that EU Member States were not keen on the Mali crisis primarily due to resource limitations or due to this and indifference (or even deference to Member State(s) that are more affected by the crisis). The latter may also stem from the original sensitivities towards this field of policy. In fact Davies explains that Mali which was a former French colony has long been a priority for French, and to a lesser extent Spanish foreign policy, and that both countries tried to push for more EU engagement for some time without much success. It was reportedly not until the deaths of European hostages prompted more interest from other states, notably the UK that even the initial decision to act under the EU framework was made. Suffice it to state that while the EU Member States at the

¹⁹⁶Ibid.

¹⁹⁷See 6.2.2. above.

¹⁹⁸Biscop, S, *et al* 'Mali: another European intervention without the EU', *Security Policy Brief*, No. 42, January 2012, p 1.

¹⁹⁹At 6.4.1.

heart of the historical relations between Europe and SSA are arguably keen to *Europeanise* their foreign policy, their 'European reflex'²⁰⁰ for SSA is not always matched by the 'European reflex' of other Member States who traditionally had no Africa policy. Of course, the former have more interests in SSA. In this regard, although it subsequently gained the support of some other EU Member States, it was France which arguably have more vested interest in Mali than any other EU Member State that eventually took the initiative to answer the call for military intervention in Mali after it failed to convince other EU Member States on the need to respond to that call.²⁰¹ Of course, the long presence of France in Mali may justify the fear of intervention without an end, but *Operation Serval* was objectively adjudged effective in Mali. Although it was not a magic bullet, and may not have fixed any of the underlying problems that caused the crisis in the first place, it certainly did halt Mali's collapse.

From a legal perspective, France did not flout the rules as it clearly consulted the other EU Member States before undertaking the action in Mali, as required by the Treaties.²⁰² In the same vein, the Member States are also not required to adopt a Joint Action. How safe then for the EU that even in its commitment to peace and security in Africa, it did not assume ultimate authority but placed this squarely where it belongs namely, on the UN and the UNSC. However, this does not detract from the requirement of coherence by way of the construction of a united vis-a-vis synergy in the sequencing of policy options available to resolve a crisis. Significantly, this requirement was not met by the Union's failure to deploy the military peacekeeping force as

²⁰⁰See Nuttall, S, *European Political Cooperation* (OUP, 1992), p 312.

²⁰¹See the previous page. This was therefore not a question of subsidiarity (Missiroli, A, 'The European Union: Just a Regional Peacekeeper?' (2003) 8 *EFA Rev.* 4, p 501). And, whether this was the same reason why France and Britain respectively went *cavalier seul* in Cote d'Ivoire and Sierra Leone during the crisis in these two countries of SSA is difficult to say.

²⁰²Article 32 TEU (ex Article 16 TEU as amended) [emphasis mine].

required pending the arrival of AFISMA in Mali. And this in turn impacts on policy coherence for development. As mentioned earlier, the HR/VP and the EEAS have little or no influence in this regard.

6.6. Conclusions

The Chapter discussed the CSDP crisis management in SSA using Mali as a case study. It submits that although the CSDP is an integral part of the CFSP and is embedded in the latter's framework as codified at Lisbon, the specificity of the former is illustrated not only by its distinct scope of objectives which was widened at Lisbon but also by its distinct institutional procedure. Against this background, it argues that while there is an overlap between the scope of the CSDP and development policy, the question of policy coherence for development even as a *façon de parler* may not arise with regards to the strictly short term *ad hoc* CSDP measures as with trade and CFSP instruments which are long term measures. Nevertheless, using Mali as a case study, it concedes that this does not mean that the question of policy coherence for development is irrelevant in the context of the CSDP as it relates to the determination of coherence based on a constructive whole *vis-a-vis* synergy in the sequencing of policy options available to resolve a crisis or conflict. Furthermore, it submits that in any event the potentials for the HR/VP and the EEAS to enhance coherence as it relates to the CSDP may be quite limited if not non-existent in the light of the specific objectives and institutional procedure of the CSDP.

Chapter Seven

7.0. The Joint Africa-EU Strategy (JAES)¹: what coherence?

7.1. Introduction

The distinct EU policies that best provide a strategic background for the analysis of policy coherence, including policy coherence for development in EU external relations law and policies with special reference to SSA have been discussed in the last four Chapters of this thesis. While there is evidence of the Union's commitment to these different dimensions of the principle of coherence in the relevant instruments of the different policies, the Union did not stop at these. Rather and true to its commitment to the pursuit of coherence, the Union eventually set out to develop an overarching framework expressly geared towards achieving, *inter alia*, coherence in EU external action towards Africa including policy coherence for development especially in the context of EU external action towards SSA.² The culminating instrument from many years of progressive effort in this regard namely the JAES was adopted in 2007 at about the same time as the Lisbon Treaty. However, the former became functional before the Lisbon Treaty came into force two years after the latter's adoption. In general, it is arguable that the Lisbon emphasis on coherence for effectiveness, amongst others,³ were equally at the core of the JAES. Indeed, the JAES only came into force before the Lisbon Treaty because the latter required full ratification by all EU Member States. In contrast to the Lisbon Treaty, the JAES is more or less a soft law instrument of a political partnership between the continents of Europe and Africa as respectively represented by the EU and its Member States

¹See The Africa-EU Strategic Partnership: a Joint Africa-EU Strategy and Action Plan, EU-Africa Summit, Lisbon, 8-9, December 2007; and also Communication from the Commission to the European Parliament and the Council - From Cairo to Lisbon – The EU-Africa Strategic Partnership {SEC(2007) 855} {SEC(2007) 856} /* COM/2007/0357 final */

²See Chapter Two of this thesis (especially at 2.5.1. and 2.5.2.).

³See Chapter One of this thesis at 1.1.

on the one hand, and the African Union (AU) and its Member States on the other hand. The JAES did not require ratification but the political agreement of the leaders on both sides. As discussed below, this political dimension of the JAES does not necessarily mean that the JAES is completely devoid of all legal relevance.⁴

Similar to EU external action towards SSA in general, the JAES has been subjected to analysis from many different perspectives.⁵ However, these have mainly centred on the assessment of the extent that the different policy objectives have been achieved.⁶ While these are legitimate aims, for the purposes of this thesis, the JAES is examined with the aim of determining its significance for the coherence of EU external action towards SSA, including policy coherence for development. As discussed below, this was one of its original aims.⁷

Although the JAES is a strategy not a policy, its analysis in this Chapter is structured in a similar way to the Chapters on the distinct EU policies analysed in this thesis.⁸ In this regard, the analysis of the JAES in the present Chapter is divided into four sections. The first section provides the contextual background to the JAES. Although it is clear that the JAES evolved on the heels of the legal instrument that primarily regulates EU external action towards SSA

4On soft law, see for example, Hillgenberg, H, 'A fresh look at soft law' (1999) *EJIL* 3, p 499-515; and Van Vooren, B, 'A case study of 'soft law' in EU external relations: the European Neighbourhood Policy' (2009) *ELRev.*, p 698).

5See for example, Mangala, J, 'Africa-EU Strategic Partnership: Historical Background, Institutional Architecture, and Theoretical Frameworks' in Mangala, J, (ed.), *Europe and the European Union: A Strategic Partnership* (Basingstoke: Palgrave Macmillan, 2013).

6Ibid.

7See the following analysis. Although the JAES also addresses coherence between the three different instruments for EU relations with different parts of Africa namely the Cotonou Partnership Agreement, the European Neighbourhood Policy (ENP) and the Trade, Development and Cooperation Agreement (TDCA) with South Africa, this dimension of coherence is outside the limited scope of this thesis. Indeed, the JAES is too extensive to make a complete mapping of all its aspects or dimensions. Because of this, only certain aspects are selected for a more careful analysis. Of course, the chief criteria for selection is relevance to answering the research question. Other delimitations regarding the analysis of the JAES are highlighted in the course of the analysis.

8See Chapters Three to Six of this thesis.

namely the Cotonou Agreement,⁹ it is not necessarily the case that the contextual background to the Cotonou Agreement provides a complete replacement for the distinct and specific evolutionary background to the JAES. The latter is therefore an important aspect of this analysis. The second section analyses the legal basis of this soft law instrument of political partnership, its scope of objectives, and the sub instruments employed for the purposes of achieving the latter with special reference to SSA. The third section pertinently discusses the institutional dimensions of the JAES including in relation to decision making and implementation. In line with the relevant previous Chapters of this thesis on distinct EU policies, this section imperatively analyses the dimensions brought by the HR/VP and the EEAS at her service especially with regards to coherence. The fourth and final section focuses on Mali as a case study for assessing the practical import of the JAES on the question of coherence in EU external action towards SSA.

The Chapter submits that the JAES is by all intents and purposes an instrument for coherence in EU external action towards Africa in general, and policy coherence for development especially in the context of EU external action towards SSA.¹⁰ However, it argues that in its practice, which mainly revolves around financial and technical support and political dialogue, the JAES follows the functional and institutional distinction between the distinct EU policies as discussed in the previous Chapters of this thesis. Conversely, the Chapter suggests that this is not surprising in so far as the JAES framework is not a separate policy but a framework built on, and intended to deepen the original frameworks of EU external action towards the African continent through further financial and technical support and also strengthened dialogue as the Mali case study illustrates. Against this background, it argues that it would nevertheless not be

⁹See Chapter Two of this thesis at 2.5.

¹⁰Where the latter mainly applies.

correct to conclude that the JAES does not have any prospects of contributing to the coherence of EU external policies towards SSA, including policy coherence for development, especially as it is flexible in following the traditional functional and institutional distinction between the relevant distinct EU policies. This, the Chapter conclusively asserts, remains the case even though the potentials of the HR/VP and the EEAS in her service to enhance coherence in this context also follow their general potential to enhance the coherence of EU external policies towards SSA, including policy coherence for development as discussed in the context of the interaction between the distinct EU policies towards the region examined in this thesis.¹¹ Overall, the Chapter reconfirms the conclusion made in the relevant previous Chapters of this thesis, that coherence of EU external action towards SSA in general, and policy coherence thereto, is a matter mainly dependent on the political will of the Member States, and sometimes, the relevant traditional EU institutions. This is the case post as pre-Lisbon and despite the coordinating role of the HR/VP and the EEAS in her service.

7.2. The legal basis, scope and instruments of the JAES

As discussed in the previous Chapters in relation to other EU policies, the legal basis, scope and instruments of EU policies are relevant to the coherence discourse. This is because these legal aspects hold implications for the procedural and institutional aspects of EU external policies including as they relate to coherence. As discussed below,¹² although the JAES is an instrument jointly agreed by the EU and its African partners, it is first and foremost an EU instrument. This means that it cannot possibly evolve outside the general principles of EU law including the law of EU external relations, in the light of the principle of conferral and the

¹¹See Chapters Three to Six of this thesis; and also Chapter Eight which offers the overall conclusion to the thesis.
¹²See below.

Staatenverbund status of the Union.¹³ Of course, this last sentence does not detract from the flexibility and pragmatism that marks the practice of EU external relations law and policies. As discussed earlier in this thesis, such flexibility and pragmatism are embraced in a bid to negotiate the complexity that naturally arises from the inevitable interaction between law and politics in what is foreign policy in all but name.¹⁴ Prior to a discussion of its legal dimension, the next section provides a pertinent contextual background to the JAES.

7.2.1. The JAES: a contextual background

As mentioned earlier,¹⁵ the JAES has a long history dating back to the established traditional frameworks of EU external relations with SSA. These previous developments are chronicled in the relevant previous Chapters of this thesis.¹⁶ However, for the purposes of this Chapter, the distinct contextual background to the JAES especially as it relates to the coherence discourse can simply be traced back to a specific development namely the EU-Africa Summit in Cairo in 2000 and the resultant Cairo Plan of Action¹⁷ (hereinafter Cairo Action Plan).

The EU-Africa Summit in Cairo was inspired by a recognition of the need for a more specific relationship with Africa. *Prima facie*, this has no connection to coherence. Nevertheless, it can be argued that it relates to coherence even if not explicitly stated. As discussed in Chapter Two of this thesis, the Union's external action towards SSA originally began with trade and development but eventually expanded to a security and political dimension. Part of the reason for this was the prevalence of conflict and political instability in SSA, and the recognition of

¹³See Chapter Two of this thesis.

¹⁴Ibid.

¹⁵At 7.1.

¹⁶See Chapters Two, Three and Five of this thesis.

¹⁷Cairo Plan of Action: Africa-Europe Summit under the ÆGIS of the OAU and the EU, Cairo, 3-4 April 2000.

the relationship between security and development. In this regard, it will be recalled that the EU foreign and security policy under the CFSP were divorced functionally and institutionally from the economic and development policies under the non-CSFP competence of the EU. Ndukanbagezi¹⁸ posits that the countries of SSA were not satisfied with the arrangement where political matters were not discussed in the same forum as the economic and development policies under the Cotonou Partnership arrangement.¹⁹ As a result of their dissatisfaction with the contrasting arrangement in relation to political matters, the countries of SSA pressed for a forum for political relations with the EU. Significantly, this development also coincided with the clamour of African countries for the EU's recognition of, and interlocution with, the Organisation for African Unity (OAU) – the predecessor of the AU. Similar to the AU, the OAU was evolving as the central coordinating point of the continental political agenda of Africa.²⁰

On the EU side, it could not have been hard to negotiate a mutual inter-continental compromise. Europe appreciates and has never been shy to stress its special relationship with Africa. Arguably, this is not only because of the historical relationship discussed earlier in this thesis,²¹ but also because SSA is the largest, potentially richest and geographically closest region to the EU in comparison with their counterparts in the African Caribbean Pacific (ACP) group of states²² as organised for development cooperation.²³ In any event, an agreement was reached between the EU leaders and their African counterparts to launch a comprehensive framework

18See Nkundabagenzi, F, '*L'Union Européenne et la Prévention Des Conflits Africain*', *RAPPORT DU GRIP*, 2000/3.

19The forum was the ACP-EU Council of Ministers which is one of the institutions of the successive association agreements between EU and SSA (Ibid., p 16).

20It had also adopted the Mechanism for the Prevention, Management and Resolution of Conflicts in 1993. OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution, The Heads of State and Government of the Organization of African Unity, Twenty-ninth Ordinary Session, Cairo, Egypt, 28-30 June 1993.

21See Chapter Two of this thesis at 2.2.4.2.

22ECDPM 'Towards a Joint Africa-Europe Partnership Strategy', Issue paper I, 'The EU-Africa partnership in historical perspective' (Maastricht: ECDPM, 2006), p 2.

23See Chapter Three of this thesis.

for political dialogue between Europe and Africa under the aegis of the EU and the AU respectively. This culminated in the EU-Africa Summit in 2000 and the resultant Cairo Action Plan. Adopted in the same year as the Cotonou Agreement, the Cairo Action Plan was a comprehensive and institutionalised framework for political dialogue between Europe and Africa with a plan of action in priority areas. This was not expressed as an instrument for coherence. However, it was arguably relevant to coherence. Indeed, its priority areas for the political dialogue traversed all the aspects of the Cotonou Agreement namely regional integration in Africa; integration of Africa into the world economy (including *inter alia*, trade and investment)²⁴; human rights, democratic principles and institutions, good governance and the rule of law²⁵; peace-building, conflict prevention, management and resolution²⁶; development issues including sustainable development challenges and poverty eradication amongst others.²⁷ As explained earlier, the Summit which gave birth to the Cairo Action Plan is a meeting of the Heads of State and Government of EU Member States on the one hand, and the Heads of State and Government of Africa countries on the other hand. It follows that these different strands of policy were discussed at the level of the EU's apex institution namely the European Council prior to joint discussion with their African counter parts. In this regard, it is arguable that bringing all these different policy areas together for discussion within the EU's apex institution²⁸ prior to joint discussion with the Union's African partners could contribute to coherence. However, it must not be lost on one that what normally obtains at this level of decision-making would mainly be guidelines and not necessarily operational decisions. As

24Other aspects of this are private sector development, development resources, industrial infrastructure, research & technology, debt, cooperation in international fora.

25Including the role of civil society, migration, refugees etc.

26Including Disarmament, demobilization, and reintegration (**DDR**) of ex-**combatants**, terrorism, small arms and light weapons, anti-personal mines, non-proliferation and post-conflict reconstruction.

27Such as health, environment, food security, drug consumption and trafficking, culture (including the export or removal of African cultural goods).

28See Chapter Two of this thesis.

discussed in Chapter Five, the European Council decision-making is limited to guidelines pursuant to Article of the Treaties, but it is the operational decisions adopted by the Council that are of more relevance to coherence in practice, and hence of more relevance to the coherence discourse. Having said that, it is noteworthy that apart from its institutional aspect, the Cairo Action Plan substantially embraced the development-security interface even though security and development were accentuated differently by the EU side and the African side respectively.²⁹

In any event, the Cairo Plan of Action did not produce very successful outcomes.³⁰ While there may have been other reasons for this,³¹ it is arguable that internal issues of coherence within the EU were also contributory factors. Indeed, six years after the *Cairo Plan of Action*, the EU recognised the persisting need for coherence and accordingly developed the EU Strategy for Africa.³²

In contrast to the Cairo Action Plan, the EU Strategy for Africa expressly evolved as an instrument for coherence. The Commission Communication³³ which proposed it says that much,³⁴ and reveals that the concentration on coherence was inspired by the need for

29As discussed in Chapter Five of this thesis, the latter is a persistent aspect of EU's relations with SSA in that the EU generally accentuates security as the precondition to development while SSA accentuates development as the precondition for security. This is of course not to say that the development-security interface is the only policy interaction with implications for coherence in EU external action towards SSA. The analysis of the EU trade policy illustrates this much (see Chapter Four of this thesis).

30See ECDPM fn 22 above, p 2.

31Perhaps including the fact that both parties (the EU and its African partners) were jointly responsible for its implementation.

32See *Council of the European Union, The EU and Africa: Towards a Strategic Partnership*, Brussels, 19 December 2005 15961/05.

33EU strategy for Africa: Towards a Euro-African pact to accelerate Africa's development. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee. COM (2005) 489 final, 12 October 2005. [EU Commission - COM Document]. This was produced at the request of the European Council (see Presidency Conclusions, Brussels, 16-17 June 2005, Council of the European Union 10255/1/05, para 75).

34The EU Strategy for Africa was adopted by the Council following this Communication produced by the

effectiveness and the need to accelerate Africa's development needs and progress towards achieving the Millennium Development Goals (MDGs).³⁵ While this was arguably about policy coherence for development, the dimension of coherence that was engaged in the first instance was vertical coherence which revolves around the coordination of EU development policy with the development policies of the Member States. Indeed, the European Council request to the Commission which prompted the latter's proposal was geared towards policy coherence for development *vis-a-vis* a global European approach towards Africa as a whole³⁶ (also known as bi-continental approach³⁷). In this regard, the Commission considered three approaches to achieving this through the EU Strategy for Africa:

Retention of approach where each Member State and the EU autonomously developed and implemented their own policies and strategies towards all African sectors, countries and organisations.

A centralised policy which would require common guidelines for all EU Member States and the EU in all areas

A balanced approach between a complete merging of aid policies and the absence of strategic co-ordination, based on the experience gained and lessons learnt from the EU's long-standing relationship with Africa.³⁸

Out of these three options which are geared towards achieving vertical coherence, the third approach was chosen by the EU on the conviction that it would give the best possible outcome in terms of effectiveness, efficiency and coherence.³⁹ This was the approach taken earlier in the

Commission

35Ibid., para 75; for more on the MDGs as an integral part of EU development policy towards SSA, and its expiration (and replacement by the Sustainable Development Goals), see Chapter Three of this thesis at 3.2.1., especially fn 59 therein.

36Council of the European Union 10255/1/05, fn 33 above, para 75.

37This has been described as a bi-continental approach in Vasconcelos, A, 'Security for Africans' (2007) 5 *ESDP* p 10.

38*The EU and Africa: Towards a Strategic Partnership*, House of Lords European Union Committee, 34th Report of Session 2005-06, Volume 1, July 2006, p 30.

39Ibid. The first approach was dropped as it would mean that EU Africa policy would remain fragmented or create duplications. The second approach was equally dropped because of the potential difficulty of reaching unanimous

European Consensus on Development.⁴⁰ By and large, the issue is primarily about vertical coherence in the context of development aid policy.

However, it is noteworthy that the Commission's Communication did not stop at vertical coherence and the bi-continental⁴¹ approach⁴² in its proposal for the EU Strategy. Rather, the Commission also included its own take which bordered on the horizontal coherence of EU policies towards the region so that the final *EU Strategy for Africa* embraced a comprehensive approach, including with a stretch towards the security-development nexus.⁴³ Of course, this was not devoid of a display of the characteristic division between the CFSP and the non-CFSP development policy. Indeed, a CFSP paper was separately produced on the security aspects of the EU Strategy for Africa covering the contribution that the CFSP and the CSDP could make.⁴⁴ This CFSP paper emphasised, *inter alia*, the importance of peace and security as a complement to the original paper presented by the EU Commission. In general, the CFSP aspect of the bi-continental approach eventually stood distinct within the JAES which the EU Strategy for Africa morphed into, leading (or adding) to compartmentalisation that has to come to mark the former in practice. This affirms the functional and institutional distinction along policy lines as discussed in the relevant Chapters of this thesis.⁴⁵ As discussed below, the implication of this for the assessment of coherence in the context of this thesis is that the JAES ultimately yields no significant separate result from the overall conclusion on coherence that could be made from

agreement in such detail for all sectors concerned. Furthermore, there was also the potential to lose specific added value by certain actors in specific sectors or regions.

40See Chapter Five of this thesis.

41Vasconcelos, fn 37 above, p 10.

42Both of which are outside the scope of this thesis (see the scope of this thesis as defined at 1.2. above).

43As indicated in Chapter five of this thesis (see Chapter Five of this thesis at 5.4., especially at fn 166), the Commission is in fact known for its influence in shaping EU-Africa policies (Sicurelli, D, 'Framing security and development in the EU Pillar structure: How the views of the European Commission affect EU Africa policy' (2008) 30 *European Integration* 2, p 217-234).

44See House of Lords European Union Committee, fn 38 above, para, 84.

45See Chapters Three to Six of this thesis.

observing the extent of compliance with policy coherence for development, and the extent of synergy in the interaction between the instruments, institutions and functional dimensions of the distinct policies of EU external action towards SSA as offered in Chapter Eight of this thesis.⁴⁶ Nevertheless, as the Mali case study illustrates,⁴⁷ while the JAES is not a distinct policy but an overall umbrella framework covering the distinct EU external policies towards Africa, its indirect approach could specifically fall short of coherence with direct or operational EU support where there is a need for synergistic sequencing of available policy options in resolving a crisis.

From the foregoing, it is clear that the *EU Strategy for Africa* was an autonomous *EU* instrument. Indeed, from all indications, there was no reference to a Joint Strategy at the beginning. This is not surprising in so far as the relevant policies are first and foremost EU policies, and their coherence is generally dependent on the Union. However, in a development that is not uncharacteristic of the contemporary dynamics of Africa-Europe relations, African leaders expressed concern that the EU had not consulted them on the EU Strategy for Africa. They also demanded that any strategy should be jointly developed and owned by both continents. Their concern was that the EU Strategy for Africa had a European bias which was not conducive to creating African ownership.⁴⁸ Eventually an agreement was reached that the African side should present a matrix towards the development of an action plan for the EU Strategy. Subsequently, a joint implementation matrix of commitments was developed and presented to the AU-EU expert's meeting in Addis Ababa in February 2006. This was endorsed

⁴⁶See the next Chapter which is the conclusion Chapter of this thesis.

⁴⁷See 7.5. below.

⁴⁸Tywuschik, V, and Sherriff, A, 'Beyond Structures? Reflections on the Implementation of the Joint Africa-EU Strategy', (2009), ECDPM *Discussion Paper* 87, p 2.

at the EU-African Troika meeting in May 2006,⁴⁹ and was the direct background to the JAES adopted in 2007 to enhance ‘the coherence and effectiveness of existing agreements, policies and instruments’.⁵⁰ Although it is a joint strategy and also committed to ‘a Euro-African consensus on values, common interests and common strategic objectives’,⁵¹ the *JAES* is not necessarily under the equal control of the EU and its African partners. Rather, similar to other EU instruments and policies including the EU Strategy for Africa which it evolved from, the *JAES* is first and foremost an EU policy,⁵² primarily implemented by the EU and its Member States.

In the same vein, although the JAES can be described as an overarching political framework for Africa-EU relations,⁵³ this is mainly with regards to its coverage of the African continent as a whole in contrast to the Cotonou Agreement which covers only SSA in the continent. In this regard, it has been suggested that the JAES co-exists rather uneasily with the Cotonou Agreement.⁵⁴ However, in practice the strategic priorities of the JAES partnership⁵⁵ arguably illustrate a reinforcement of the provisions of the Cotonou Agreement. This forges a better view of the JAES as an instrument for coherence. Nevertheless, it does not equally provide a final indicator as to the legal and institutional implications of the JAES for coherence in the context of EU external action towards SSA. This can only be addressed by an analysis of the legal and

49Final Communiqué: EU-Africa Ministerial Troika Meeting, May, 2006, Vienna, Council of the European Union 9333/06.

50JAES, fn 1 above, para 6.

51See the JAES, fn 1 above.

52This view, which may appear trite, is also expressed by the House of Lords EU Committee (fn17 above, at para 435); also see Cremona, M, ‘The European Neighborhood Policy: more than a partnership?’ in Cremona, M, (ed.), *Developments in EU External Relations Law* (OUP, 2008), p 277) where she expresses the same view with regards to the ENP which also had ‘joint ownership’ at its core; and Van Vooren, B, ‘A case-study of ‘soft law’ in EU external relations: the European Neighborhood Policy’ (2009) *ELRev*, p 698. In contrast to the *JAES*, The ENP has been accorded a Treaty status under Article 8 TEU.

53Bossuyt, J, and Sherriff, A, ‘What next for the Joint-Africa-EU Strategy’, ECDPM 2010, p 7.

54Ibid.

55See 7.2.3. below.

institutional dimensions of the JAES. In this regard, the following sub-sections will discuss the legal basis and scope of the JAES prior to the discussion of the sub-instruments of the JAES and the institutional dimension of the JAES with special reference to SSA.

7.2.2. The legal basis for a 'politico-legal' JAES

There is no express indication of the legal basis which the pre-JAES EU Strategy for Africa was created under. The same goes for the JAES. Its legal basis is not expressly indicated. This is *prima facie* contrary to the core principles of EU external relations law as discussed in Chapter Two of this thesis. However, as will equally be recalled from that Chapter, flexibility is also a characteristic of EU external relations law, allowing for some exigencies to be met in the practice of EU external relations. In this regard, Hillion⁵⁶ notes that the increasing use of instruments that are not explicitly envisaged by the Treaties is one of the recent trends in the practice of EU external relations.⁵⁷ In general, that the flexible instruments are not envisaged in the Treaties means that they are not specific to any legal basis. However, this is not to say that the lack of a specific legal basis for a flexible instrument translates to a lack of any basis in the EU legal order for their existence. The JAES is illustrative in this regard.

The lack of an explicit legal basis for the *JAES* makes it difficult to locate its exact place in EU external relations law. However, an understanding of its place in this field of EU law is an integral part of this study. This is not solely due to the *Staatenverbund* status of the EU and the attendant principle of conferral, but also because this study is primarily a legal analysis albeit placed in its historical and political contexts. In this regard, this section discusses the JAES as

⁵⁶See Hillion, C, 'The EU's Neighbourhood Policy towards Eastern Europe' in Dashwood, A, and Maresceau, M, *Law and Practice of EU External Relations* (Cambridge University Press, 2008).

⁵⁷ Ibid., p 309.

a hybrid CFSP instrument with a cross-pillar effect in the context of EU external action towards SSA.

From a legal perspective, the JAES could *prima facie* be construed as an instrument outside the Treaty framework similar to the pre-Lisbon ENP. However, the JAES could also be contrasted from the pre-Lisbon ENP to the extent that the former is arguably implementing an existing instrument namely the Cotonou Agreement.⁵⁸ In any event, the JAES cannot be categorised as an instrument of the Union's non-CFSP competence under the ex-Community Pillar. This leaves it with being either a CFSP instrument or an instrument of what has been described as the EU's hidden Fourth pillar.⁵⁹ From all indications, the JAES could rightly be construed as a CFSP instrument or at least a CFSP aspect of a flexible Fourth Pillar if this exists. In this regard, it matters little that the JAES may be reaffirming or even be 'substantiating' the Cotonou Agreement. Indeed, as will be recalled from Chapter Five of this thesis, the Common Position on Africa⁶⁰ illustrates that the EU can pursue any of its external policy objectives towards Africa through any of its external policies. This is a position that has since been reaffirmed in the *ECOWAS* case⁶¹ and most recently has also been entrenched in the Treaties.⁶² The legal basis for CFSP instruments have been discussed in Chapter Five of this thesis. Substantially, the analysis was limited to the two core CFSP instruments namely 'decisions defining actions to be taken by the Union' (formerly known as Joint Action) and 'decisions defining positions to be taken by the Union' (formerly known as Common Position).⁶³

58 Mangala, fn 5 above, p 10.

59See Torrent, R, 'The 'Fourth Pillar' of the European Union After the Amsterdam Treaty' in Dashwood, A, and Hillion, C, (ed.) *The General Law of EC External Relations* (London: Sweet and Maxwell, 2000), p 221-235.

60Common Position concerning conflict prevention, management and resolution in Africa [2005] *OJ* L97/57.

61Case C-91/05 *Commission v Council (ECOWAS/SALW)* [2005] *OJ* C115/10.

62By virtue of Article 21(2) TEU.

63See Chapter Five of this thesis at 5.3. where the *sui generis* comprehensive EU Strategy for the Sahel was also discussed due to its primarily functional and institutional leaning towards security as an aspect of foreign and security policy (see Chapter Five of this thesis at 5.3.3.).

Essentially, although the CFSP instrument of systematic cooperation⁶⁴ was identified in that Chapter, it was excluded from that analysis. However, its exclusion from that Chapter was not a case of an undue decision to merely overlook or ignore it as is generally attributed to analysts of EU foreign policy.⁶⁵ Rather, the analysis in that Chapter was limited to the two core CFSP instruments with clear and direct legal, institutional and practical implications for coherence between the CFSP and the non-CFSP EU external action.⁶⁶

In the context of this Chapter, the analysis of the place of the JAES within EU external relations law brings to fore the relevance of the CFSP instrument of ‘systematic cooperation between Member States in the conduct of policy’.⁶⁷ Significantly, this instrument has never been expressly analysed in relation to EU external action towards SSA in general or the *JAES* in particular. In general, the discussion of the *JAES* as an instrument of systematic cooperation under EU external relations law draws mainly from Wessel’s analysis.⁶⁸ In this regard, Wessel opines that the outcome of the systematic cooperation between the Member States may include agreements on concerted and convergent actions that are not laid down in one of the formal CFSP instruments.⁶⁹ These agreements results in declarations such as ‘Presidential Declarations’, ‘Declarations’, ‘Conclusions’, ‘Decisions’ or ‘Action Plans’ of the Council that are not based on specific legal bases.⁷⁰ Other aspects include, ‘Road Maps’,⁷¹ oral agreements between Member States or statements made by the Presidency and tacitly accepted by the

64Article 25(c)TEU (ex Article 12 TEU).

65Keukeleire, S, and MacNaughtan, J, *The Foreign Policy of the European Union* (Houndmills: Palgrave. Macmillan, 2008), p 159.

66However, see fn 63 above.

67Article 25(c)TEU (ex Article 12 TEU).

68Wessel, A, *The European Union’s Foreign and Security Policy: A Legal Institutional Perspective* (The Hague: Kluwer, 1999), p 108-115.

69Ibid, p 109.

70Ibid.

71Hillion, fn 56 above, p 309.

Member States, as well as political dialogues.⁷² These are the forms of instrument adopted in the context of the *JAES* starting from the Cairo Declaration and Action Plan in 2000 up to the Lisbon Declaration on the *JAES* in 2007.⁷³ In fact, ‘joint strategy’ has been listed as a CFSP instrument elsewhere⁷⁴ and there is no reason to regard this as an error. In any event, it is noteworthy that these are not by definition less influential than those CFSP legal instruments analysed elsewhere in this thesis.⁷⁵ In fact, as discussed elsewhere in this thesis,⁷⁶ from a legal perspective, these instruments could be categorised as soft law instruments. A lack of express indication of a legal base in an instrument does not nullify the latter or render it illegal.

Having said that, it is noteworthy that these instruments are not expressly classified as CFSP instruments. Furthermore, they are essentially flexible as mentioned earlier. However, this is not difficult to understand going by the benefits of flexible atypical devices of EU external relations law as explained by Hillion.⁷⁷ One of these benefits is the ability of the flexible mechanisms to offer a relative immunity to the usual institutional competence-squabbles that characterise the EU system of external relations.⁷⁸ Another benefit offered for the resort to the flexible mechanisms is their ability to stimulate change in the existing relationship between the EU and its partners.⁷⁹ For example, Hillion further posits that although such non-specific instruments can be problematic in terms of legal certainty, transparency and accountability, they allow the EU to carve out more coherence and effective foreign policies.⁸⁰ Indeed, the *JAES* is

⁷²Wessel, fn 68 above, p 109.

⁷³For all the instruments of the political partnership in chronological order see <http://www.consilium.europa.eu/policies/foreign-policy/third-countries-and-regions/eu-africa-relations?lang=en>

⁷⁴See Ferreira, P, *et al*, ‘The EU’s Common Foreign and Security Policy: Opportunities for a more Effective EU Response to Crisis-Affected Countries in Africa’ (2001) ECDPM *Discussion Paper* 22.

⁷⁵Wessel, fn 68 above, p 115.

⁷⁶See Chapter Two of this thesis at 2.5.2. including in particular fn 254 therein.

⁷⁷See Hillion, fn 56 above, p 309.

⁷⁸*Ibid.*; also see for example the *ECOWAS/SALW* case (fn 61 above).

⁷⁹*Ibid.*

⁸⁰*Ibid.*

an illustration of the flexibility that comes with an atypical EU instrument, and the attendant opportunity to stimulate change and coherence in an existing relationship. However, although the *JAES* may have provided a relative immunity to the usual competence squabble and enabled the EU to stimulate change in its existing relations with SSA, the question of whether it has allowed the EU to carve out a more coherent and effective foreign policy towards SSA is one that does not have an easy answer. Ultimately, the answer may well depend on the dimension of coherence in question.⁸¹ With specific regards to policy coherence for development including coherence based on the construction of a united whole *vis-a-vis* synergy in the sequencing of available policy options, it could be argued that the answer to whether the JAES has enhanced these in EU external relations towards SSA will not be different from the general conclusion regarding same in the light of the post-Lisbon legal and institutional changes.⁸² Illustrative is the Mali case study.⁸³ This is because, as the Mali case study also illustrates, the JAES which is not a separate policy but a new bi-continental framework follows the functional and institutional distinction between the distinct EU policies as discussed in the relevant previous Chapters of this thesis. Of course, this is not to say that the JAES does not have any prospects of contributing to the coherence of EU external policies towards SSA, including policy coherence for development. Arguably, these prospects are reflected in the scope of objectives of the JAES, its sub-instruments⁸⁴ and institutional dimension as will now be discussed in turn in that order.

81As indicated above (at 7.2.1. above), the JAES is geared towards enhancing ‘the coherence [and effectiveness] of *existing agreements, policies and instruments*’ (JAES, para 6). There is also the vertical dimension to these which, similar to the coherence of existing instruments, is outside the scope of this thesis (see fn 42 above).

82See Chapter Eight of this thesis.

83See 7.5. below.

84Or implementing instruments.

7.2.3. The scope of objectives of the JAES and coherence with special reference to SSA

The scope of the JAES as it relates to coherence can be gleaned from the fact that it is geared towards enhancing ‘the coherence and effectiveness of existing agreements, policies and instruments’, and also provides ‘a political vision and roadmap for the future cooperation between Europe and Africa in existing and *new areas and arenas*’.⁸⁵ This means that its scope of coverage would traverse the scope of existing agreements, policies and instruments of EU external relations with SSA, and could also evolve to cover new areas as may be deemed fit in the future. Significantly, the scope of issues to which the systematic cooperation applies is not subject to any limitation in time and space.⁸⁶ Indeed, as the following analysis illustrates, the JAES has evolved.

From origin, the JAES sets out four main objectives of the partnership in a comprehensive framework within which specific strategies will have to be put in place. The four main objectives are ‘(a) peace and security, (b) governance and human rights, (c) trade and regional integration and (d) key development issues.’⁸⁷ These objectives are pursued through eight strategic partnerships. The partnerships illustrate an embrace of the existing wide areas of coverage in EU external action towards SSA. Substantially, these include (1) peace and security, (2) democratic governance and human rights, (3) trade, regional integration and infrastructure, (4) MDGs, (5) energy, (6) climate change and environment, (7) Migration, Mobility and Employment, and (8) Science, Information Society and Space. Arguably, these areas of strategic partnership are more or less essential for the achievement of sustainable development and ultimately the eradication of poverty.⁸⁸ However, for the purposes of this analysis which borders

⁸⁵On the former see fn 81 above; and on the latter see JAES, fn 1 above, para 3, [author's emphasis].

⁸⁶Wessel, fn 68 above, p 101.

⁸⁷JAES, fn 1 above, para 10.

⁸⁸See Chapter Three of this thesis at 3.2.3. on the scope of development policy.

on the examination of the JAES as an overarching instrument of coherence in the context of EU external action towards SSA, the discussion of the strategic partnerships of the JAES here are limited to the more pertinent strategic partnerships. These are the peace and security partnership, the trade partnership, and the partnership for the MDGs which is about development policy. The pertinence of these strategic partnerships stems from their more direct policy proximity to the core EU policies selected as case studies in the context of this thesis namely development policy, trade policy and foreign and security policy under the CFSP and CSDP.⁸⁹ Even then, the delimitation sounded above⁹⁰ applies to the discussion of these strategic partnerships. This is not only because the intricate details of these partnerships are irrelevant to answering the research questions, they also cannot be easily boiled down and strictly defined.⁹¹ Suffice it to state that the scope of the JAES is as vast as the EU and the Member States will agree. In this regard, the pertinent partnerships are discussed under the instruments as follows.⁹²

7.3. The politico-legal instruments of the political partnership with special reference to SSA: the JAES and the pertinent sub-instruments

From the foregoing, it is clear that the JAES is the core instrument of this political partnership between the continents of Europe and Africa with the EU and the AU as their respective interlocutors. However, it also gives an indication of the instruments of its implementation. These are ‘successive short-term Action Plans and enhanced political dialogue at all levels,

⁸⁹See Chapter Three to Six of this thesis; and for more on the JAES partnerships, see in general, Mangala, fn 5 above.

⁹⁰See fn 7 above.

⁹¹See for example Elowson, C, ‘The Joint Africa EU Strategy – a study of the peace and security partnership’, FOI, Swedish Defence Research Agency, 2009, p 13, where she makes this point with specific regards to the peace and security partnership; also see Olayode, K, ‘The Africa-EU Strategic Partnership Agreement and the MDGs’ in Eze, O, and Sesay, A, (ed.) *Africa and Europe In the 21st Century* (Lagos: Nigerian Institute of International Affairs, 2010), p 152-176, at p 168 and also p172, where he makes similar point with specific regards to the MDG partnership.

⁹²See in particular 7.3.2. below.

resulting in concrete and measurable outcomes in all areas of the partnership'.⁹³ This section will discuss these cursorily with special reference to their added value to the coherence discourse. However, their discussion will be preceded by a cursory analysis of the JAES itself with special reference to coherence, especially the coherence of EU external action towards SSA.

7.3.1. The JAES: the key instrument and coherence

As indicated above,⁹⁴ the JAES is an instrument of coherence adopted at about the same time as the Lisbon Treaty. Indeed, it can be argued that the *JAES* was adopted in the same spirit as the Lisbon Treaty which has at its core the coherence of EU external action. In fact, Görtz and Sherriff explains that the JAES was originally billed as the panacea for policy incoherence.⁹⁵ This could be traced back to the EU Strategy which the JAES evolved from. However, as the House of Lords EU Committee reported on the former prior to the *JAES*:

‘The EU Strategy appears on paper to be a shining example of an attempt by the EU to co-ordinate its various policies in development, security and economic growth to achieve the MDGs. However, it does not state how this level of coherence will actually be brought about [...]’⁹⁶

As already indicated above, the EU Strategy for Africa gave way for the JAES which arguably transcended the original primary focus on vertical coherence to set the course firmly on

93JAES, fn 1 above, para 5.

94At 7.1.

95See in general Görtz, S, and Sherriff, A, 'Is the Joint Africa-EU Strategy still the future?', Nordic Africa Institute (NAI) Forum, 2 March 2011, available at <http://ecdpm.org/publications/jaes-joint-africa-eu-strategy-still-the-future/>, accessed 22 March 2016.

96At p 33, para 103. Although the paragraph also touches on the fact that the Strategy does not address issues such as agricultural policy which have a significant impact on African economies, the Union's Common Agricultural Policy and its impact on coherence is outside the scope of this thesis (see Chapter Four of this thesis).

horizontal coherence including as it relates to policy coherence for development. In fact, the EU *ad hoc* Working Party for the negotiation of the JAES was tasked with, *inter alia*, ensuring 'overall policy coherence, drawing on Member States' and the Commission's expertise.'⁹⁷

Within the JAES itself, the requirement of coherence is captured as follows:

'In the implementation of this new partnership, the principle of policy coherence for development will be applied by both African and EU partners by identifying and promoting interactions and positive complementarities between sectoral policies and strategies, while ensuring that measures taken in one policy area do not undermine results in other areas.'⁹⁸

The above paragraph does not just make reference to horizontal policy coherence across EU sectoral policies and strategies in general, but also refers specifically to policy coherence for development. Hence, it reaffirms the supremacy of the requirement of policy coherence for development in the light of the place of development policy in the unexpressed hierarchy of EU external policies towards SSA as discussed earlier in this thesis.⁹⁹ Of course whether the JAES has proved a panacea for incoherence in practice is another matter. In any event, the paragraph also brings to mind the question of EU-Africa joint responsibility for coherence which was discussed in Chapter Two of this thesis, albeit with specific regards to the Cotonou Agreement.¹⁰⁰ In this regard, although both sides commit themselves to enhancing coherence under the JAES, such affirmation is not necessarily an indication of a shared responsibility for the requirement of coherence in this context.¹⁰¹ Indeed, it is difficult to see how the Union's partners will ensure coherence beyond demanding (during negotiations or political dialogues) that the EU ensure same. This does not detract from the fact that even though the duty is on the

⁹⁷See Council of the European Union, Establishment of an *ad hoc* working party on the Joint EU-Africa Strategy, 9246/1/07 REV 1, Brussels, 22 May 2007, para 4, 2nd indent.

⁹⁸JAES, para 11.

⁹⁹See Chapters Two and Three of this thesis.

¹⁰⁰See Chapter Two of this thesis at 2.5.1.2.

¹⁰¹*Ibid.*

Union to ensure the coherence of its external policies towards SSA, the complexity of a joint-responsibility for implementation could have a watering down effect on coherence in practice. Illustrative is the Mali case study.¹⁰²

7.3.2. Action Plans

While the JAES defines the key objectives of the political partnership, the priority actions for the different partnerships are spelt out in the successive Action Plans which follows the schedule of the triennial EU-Africa Summits.¹⁰³ Of course, the latter does not neutralise the origin of the policy aspects of the partnerships. As discussed earlier, the joint agreement or joint implementation of the JAES does not strip it of its origin as an EU policy. The same goes for the Action Plans. In practice, the original eight partnerships have been maintained¹⁰⁴ with only their priority actions expanding where deemed necessary in the successive Action Plans.¹⁰⁵ Illustrative of the latter is the analysis of the following four pertinent partnerships.

¹⁰²See 7.5. below.

¹⁰³See for example fns 1 and 17 above.

¹⁰⁴However see the Declaration emanating from the Fourth EU-Africa Summit, 2-3 April 2014, Brussels, where the reaffirmation of commitment to the original objectives of the JAES (para 2), was followed with five new priorities for 2014-2017 namely: Peace and Security; Democracy, Good Governance and Human Rights, Human Development; Sustainable and inclusive development and growth and Continental Integration; Global and emerging issues (para 60). Since much has not been heard about this, it may be that the needed working mechanisms and structures required to implement the agreed actions and reach the expected results are yet to be identified or still being pursued (para 61). The next EU-Africa Summit will take place in 2017 as agreed by both sides (para 63).

¹⁰⁵Ibid.

7.3.2.1. Partnership on the MDGs¹⁰⁶

Although the MDGs were arguably about development policy in all its ramifications, the MDG partnership focuses on a limited number of areas where the partners consider that the partnership can really add value and make a difference. In this regard, the overarching themes of Financing and Policy base for the MDGs, Education, Health and Food Security were pursued in the First Action Plan (2008-2010).¹⁰⁷ And these expanded to include Health, Education, Gender, Water and Sanitation, Agriculture, and Disability in the Second Action Plan (2011-2013).¹⁰⁸ Indeed, the first partnership expressly stated that new areas could be selected on a rolling basis and that those areas not included were mainly those areas in which intense work was already going on in other fora. In the context of EU relations with SSA, the MDGs were also implemented as an integral part of EU development cooperation with SSA under the Cotonou Agreement as discussed in Chapter Three of this thesis.¹⁰⁹ In practice, the difference between the two dimensions is insignificant. Indeed, it can be argued that there is not a lot going for this aspect of the partnership outside the support to the MDGs under development policy in the context of the Cotonou Agreement.¹¹⁰ For example, both the 12 Point Action Plan in support of the MDGs,¹¹¹ and the earlier MDG Contracts¹¹² were launched by the Commission under

106The analysis starts with this partnership only because development is expressly at the heart of EU external relations with SSA as discussed in Chapters two and Three of this thesis (of course this does not negate the security-development interface as also discussed in these Chapters and also Chapter Five of this thesis).

107As Priority Actions One to Four.

108As Priority Actions One to Six.

109See Chapter Five of this thesis at 3.2.1.

110As indicated above, the JAES does not offer any new policy that is different from the original policies such as those discussed in the relevant previous Chapters of this thesis. It only brings an indirect approach to the issues. In this regard, it does not have any specific dedicated funding mechanisms, all activities have to be financed under existing arrangements (see Chapter Four above; also see the joint report by BOND and ECDPM, 'The EU and Africa: the Policy Context for Development', November, 2010, p 19, available at https://www.bond.org.uk/data/files/EU_and_Africa_broch_v13.pdf, accessed 02 May, 2016 (hereinafter BOND and ECDPM)

111See European Commission, 'A Twelve-Point EU Action Plan in Support of the Millennium Development Goals', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, COM (2010) 159 FINAL, Brussels.

112See European Commission, 'Technical Discussion Paper on a "MDG Contract" --- A Proposal for Longer Term and More Predictable General Budget Support', 2009, available at

development policy in the context of the Cotonou Agreement. Pertinently, Mali – the country of case study in this thesis – was one of the countries the Union signed the MDG Contract with.¹¹³ It is not clear how the expiration of the MDGs affects this partnership.¹¹⁴ In any event, it has been suggested that this JAES partnership lost relevance mostly because it was deemed that the national level was more appropriate.¹¹⁵

7.3.2.2. The partnership trade, regional integration and infrastructure

The *JAES* partnership on trade, regional integration and infrastructure seeks, *inter alia*, to contribute to ‘enhance the African integration agendas, both at the regional and Pan-African levels’ and to foster coherence among current initiatives in the area of trade and regional integration. Its priorities as listed in the First Action Plan (2008-2010) included: (a) supporting the African integration agenda; (b) strengthening African capacities in the area of rules, standards and quality control; and (c) implementing the EU-Africa Infrastructure Partnership. This indirect approach to EU trade policy towards the countries of Africa was expanded in the Second Action Plan (2011-2013) to 16 short-term priority plans including one on integration, six on trade and nine on infrastructure. As mentioned above, the indirect approach under the JAES is facilitated through financial and technical support and political dialogue. Effectively, the operationalisation of the trade partnership under the JAES has no significant bearing on the

<http://doku.cac.at/eudiscussionpaper070619.pdf>, accessed 12 April 2016. The direct link to the Contracts provided on the Commission's Website leads to an error message (the link is available at https://ec.europa.eu/europeaid/policies/european-development-policy/eu-millennium-development-goals_en, accessed 02 May, 2016).

113See Babarinde, O, and Wright, S, 'Africa-EU Partnership on the Millennium Development Goals' in Mangala, fn 5 above, p 123 – 147 at p 143.

114See Chapter Three of this thesis at 3.2.1. above, at fn 59.

115Directorate-General for External Policies of the Union (Directorate B) Policy Department Study, 'The Implementation of the Joint Africa Europe Strategy: Rebuilding Confidence and Commitments', March 2014, EXPO/B/AFET/2013/42 (hereinafter Directorate B Study), available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/deve/dv/jaes_study_/jaes_study_en.pdf, accessed 02 May 2016.

key trade aspect of EU relations with SSA namely the negotiation of the Economic Partnership Agreements (EPAs).¹¹⁶ In fact, where the EPAs were engaged, the modest goal was to ensure that they support Africa's efforts on regional integration and to enhance the AU's role in monitoring the EPAs.¹¹⁷ As will be recalled from Chapter Four of this thesis, the EU negotiates the EPAs at the level of the Regional Economic Communities (RECs), and not at the continental level of the AU. In this regard, it will not be wrong to conclude that the trade partnership under the JAES is of little or no significant effect to the requirement of policy coherence in general, and policy coherence for development in particular with special reference to SSA. Alternatively, it could be argued that the value added by this partnership to the quest for the enhancement of these dimensions of coherence is not clear.

7.3.2.3. The peace and security partnership

The peace and security partnership has a wide scope. It addresses all aspects of the conflict cycle including prevention, peace-keeping, post-conflict relief, rehabilitation and development, with a special emphasis on addressing the root causes of conflict and instability.¹¹⁸ In the First Action Plan, these were pursued through three priority actions namely (1) political dialogue to address crisis and challenges to peace, security and stability, (2) operationalisation of the African Peace and Security Architecture (APSA) to address peace and security challenges in Africa, and (3) predictable funding (and technical support) for Peace Support Operations (PSO) undertaken by the AU or under its authority.¹¹⁹ The Second Action Plan (2011-2013) mainly expanded the confines of dialogue from conflict and crisis contexts as they arise, to peace and

¹¹⁶See Chapter Four of this thesis; also see BOND and ECDPM, fn 110 above, p 20.

¹¹⁷See for example, First Action Plan, *Priority Action 1 - Support the African Integration Agenda*.

¹¹⁸Elowson, fn 91 above, p 23.

¹¹⁹See Joint Africa EU Strategy Action Plan 2010-2013.

security thematically, and to other broader issues like terrorism, in a long term perspective.¹²⁰ Invariably, the indirect approach of the peace and security partnership is funded through the African Peace Facility (APF) derived from the European Development Fund (EDF).¹²¹ However, the partnership is distinctly conducted under the framework of the CFSP and CSDP¹²² hence maintaining the traditional distinction between the CFSP and the non-CFSP dimension of security policy under development policy and in the context of the Cotonou Agreement. Significantly, the institutional dimension of the JAES follows this even if it does so in a flexible manner. Having said that, it is noteworthy that while balancing the provision of direct, operational support with support for building African capacity presents a challenge for the EU,¹²³ it is difficult to distinguish between the indirect EU support for building African capacity under the CSDP on the one hand, and under the JAES framework on the other hand. In any event, the peace and security partnership is the most successful of the JAES partnerships,¹²⁴ and is actually the partnership that is substantially examinable for the purposes of assessing the relevant dimensions of coherence using Mali as a case study.

7.3.3. Political dialogue

A second core instrument of the JAES is political dialogue. Although the JAES is not categorised as either CFSP or non-CFSP, it follows from the above analysis of the nature of the JAES under the law of EU external relations that the political dialogue under the JAES could be classified as a CFSP political dialogue. Wessel and Monar describe the conditions under

120Haastrup, T, 'Africa-EU Partnership on Peace and Security' in Eze and Sesay, fn 90 above, p 47 – 64, at p 58.

121Article 12 of Council Regulation (EC) No 617/2007 of 14 May 2007 on the implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement provides the legal basis for the African Peace Facility (APF) under the 10th EDF for the period 2011-2013.

122See Elowson, fn 91 above.

123See House of Lords, fn 38 above, para 365; and also Chapter Six of this thesis at 6.5.

124See for example, Directorate B Study, fn 115 above, p 14.

which the CFSP dialogue takes place.¹²⁵

Firstly, there has to be a formal decision by the Political and Security Committee (PSC)¹²⁶ and/or relevant ministers to engage in a 'dialogue'. Secondly, there has to be a formal agreement with the third states concerned. This can take any of the following forms; informal agreement between the Presidency and the third states, common understanding, formal treaty obligation, or the form of a joint declaration. Lastly, the agreement must provide for regular political contacts at one of several levels, in addition to normal diplomatic relations.¹²⁷ In fact, the JAES itself could be classified as a CFSP political dialogue.¹²⁸ However, while the JAES provides for regular political contacts at several levels, in addition to normal diplomatic relations, there has been a suggestion that political dialogue was generally not improved or expanded under its framework due to a general dilution of its political substance and the absence of political leadership on both sides.¹²⁹ Therefore, the effect of political dialogue under the JAES on the quest for coherence cannot easily be determined, even with a case study. Indeed, a political dialogue may take place without any publicly available recorded evidence.

Overall, it has been suggested that the JAES implementation 'has tended to focus on technical issues in the Joint Expert Groups (JEGs)¹³⁰ that are susceptible to functional 'quick wins' albeit low ambition ones (such as events, meetings and workshops)'.¹³¹ Conclusively, it may safely be

125Wessel, fn 68 above, p 114-115; also Monar, J, 'Political Dialogue with Third countries and regional Political Groupings: The Fifteen as an Attractive Interlocutor' in Regelsberger, E, *et al* (ed.) *Foreign policy of the European Union: from EPC to CFSP and Beyond* (London Lynne Rienner, 1997), p 263-264.

126See Chapter Five of this thesis at 5.4.1. and Chapter Six at 6.4.1.

127Ibid.

128See 7.2.2. above. This does not detract from the view that the JAES may actually be 'substantiating' the Cotonou Agreement as discussed in that section; also see Van Vooren (fn 4 above) who theorised this in relation to the ENP Plan of Actions.

129See the BOND and ECDPM report at fn above 110 above, p 19.

130See 7.4.2. below.

131See the BOND and ECDPM report at fn above 110 above, p 19.

argued that while the JAES has successfully mobilised thematic partnerships through a common framework, this does not automatically amount to synergies between these thematic partnerships. The latter at all times depends on the political will of the Member States, and sometimes relevant EU institutions as discussed in the relevant previous Chapters of this thesis.¹³²

7.4. EU Institutions and the JAES

As discussed above, although the JAES is cast as a partnership, it is arguably first and foremost an EU policy. In this regard, although the institutional challenges relating to its implementation may be found both on the European side and the African side, the analysis in this Chapter is limited to the scope of this thesis. Essentially, the emphasis in this analysis is on the institutional dimensions of the JAES as they relate to coherence mainly on the EU side.

Although the evolution of the JAES has been traced back to the Cairo Action Plan, it is not necessary to discuss the institutional dimension of the latter in a bid to answer the research question this thesis set out to answer. In contrast, the focus of the analysis is on the post-Lisbon institutional dimension of the JAES.¹³³ Of course, this is not to say that all references to the relevant supporting institutions which were there before the post-Lisbon EEAS are eschewed from the analysis. Having said that, it is noteworthy that the EU Strategy for Africa which morphed into the JAES did not directly address the institutional mechanisms which remained in their existing form.¹³⁴ In contrast, its final institutional dimension was left dependent on

¹³²See Chapters Three to Six of this thesis.

¹³³Indeed although the JAES came into effect before the Lisbon Treaty, it is arguable that it had not significantly been operationalised before the latter came into force.

¹³⁴House of Lord, fn 38 above, para 137.

circumstances and flexibility.¹³⁵ Significantly, this could equally be said of the JAES especially in the light of its atypical nature under EU external relations law and policies as discussed above. Against this background, the following analysis draws from the provisions of the Treaties and other secondary materials that deals with the institutional dimension of the JAES.¹³⁶ In doing this, the analysis does not delve into the complex web of all the diverse institutions of the JAES which are rather difficult to entangle, even as they are marked by scarcity of studies.¹³⁷

7.4.1. Institutions and JAES Decision-making

Due to the politico-historical evolutionary background of the JAES in the EU-Africa Summits which is a meeting of the Heads of State and Government of both sides, it is not hard to recognise the role of the European Council in decision-making in this context.¹³⁸ While it does not exercise legislative function,¹³⁹ the European Council has the responsibility for identifying the Union's *strategic interests*, determining the objectives of and defining general guidelines for the CFSP.¹⁴⁰ Arguably, this would guide the Council's decisions as much in the context of the JAES as in other areas of EU external relations.¹⁴¹ The General Secretariat of the Council and (post-Lisbon) the EEAS are supporting institutions in this regard, as is the Council Working

¹³⁵Ibid., paras 83 and 86.

¹³⁶With regards to the latter, the most recent secondary material which this study draws from is Directorate B Policy Study, fn 115 above; other earlier reports include Mangala, J, 'Africa-EU Strategic Partnership: Historical Background, Institutional Architecture, and Theoretical Frameworks' in Mangala, fn 5 above; Tywuschik and Sherriff, fn 48 above; Elowson, fn 91 above; and also Pirozzi, N, 'EU Support to African security architecture: funding and training components', EUISS *Occasional Paper* 76, February 2009.

¹³⁷See Mangala, fn 136 above, p 28; for a helpful visualisation of the institutional architecture of the JAES, see Directorate B Study, fn 115 above, p 77 (the same visualisation is replicated in annex IV attached to this thesis).

¹³⁸As will be recalled from Chapter Two of this thesis (at 2.5.3.1 above), the European Council consists of the Heads of State and Government of EU Member States albeit together with its President and the President of the Commission (Article 15(2) TEU).

¹³⁹Article 15(1) TEU.

¹⁴⁰Article 26 TEU (ex-Article 13 TEU) [author's emphasis].

¹⁴¹As will be recalled from 7.4. above, the institutional architecture for the JAES was not determined but left dependent on circumstances and flexibility.

Group for Africa (COAFR).¹⁴² In any event, the EU Strategy for Africa illustrates that the European Council and the Council could avail themselves of the support of the Commission in this regard.¹⁴³ With specific reference to the coherence of EU external action towards SSA, this decision-making framework would provide a good opportunity for enhancement of policy coherence in general, and policy coherence for development in particular, in the long term. However, as in every case, the recognition of the need to heed to the requirement of the relevant dimensions of coherence on paper, does not always translate to practical manifestation in the implementation. Indeed, as indicated above with specific regards to the JAES, the mobilisation of thematic partnerships through a common framework, does not automatically amount to synergies between these thematic partnerships. Illustrative is the JAES implementation which institutionally follows the traditional institutional distinctions in the field of EU external relations law and policies even if it follows that latter flexibly.

7.4.2. Institutions and JAES implementation

In general, it is noteworthy that flexibility in dialogue and cooperation formats give more room for manoeuvre in JAES implementation.¹⁴⁴ This obviously renders its institutional dimension specifically cumbersome and difficult to navigate.¹⁴⁵ It follows that the delimitation sounded

¹⁴²See Directorate B Study, fn 115 above, p 77; also see Mangala, fn 136 above, p 29 for a visualisation of the pre-Lisbon institutional architecture. However, it is noteworthy that this has not always been the case. For example, the draft Council Conclusions on the EU Strategy for Africa – the direct precursor to the JAES - all originated from the ACP Working Group (see for example Draft Council Conclusions on the EU-Africa Strategy, 14417/05, 14/11/2005; Draft Council Conclusions on the EU-Africa Strategy, 14417/1/05, 15/11/2005; and Draft Council Conclusions on the EU-Africa Strategy, 14450/05, 16/11/2005, available at http://register.consilium.europa.eu/servlet/driver?page=Result&ssf=DATE_DOCUMENT+DESC&srm=25&md=400&typ=Simple&cmsid=638&ff_SOUS_COTE_MATIERE=&lang=EN&fc=REGAISEN&ff_COTE_DOCUMENT=&ff_TITRE=EU-Africa Strategy&ff_FT_TEXT=&dd_DATE_REUNION=&single_comparator=&single_date=&from_date=&to_date=, accessed 14 May 2013

¹⁴³See fn 35 above.

¹⁴⁴See Directorate B Study, fn 115 above, p 24.

¹⁴⁵Mangala, fn 136 above, p 42.

above¹⁴⁶ unavoidable applies to this aspect of the analysis.

In this regard, the main EU actors engaged (or that may be engaged) in the implementation of the JAES are the Commission, the Council, and the EU Delegation to the AU, the EEAS and the Member States.¹⁴⁷

The Commission is tasked with facilitating the JAES, even though its implementation on the EU side remains a joint responsibility it shares with the Member States.¹⁴⁸ The Commission's involvement here does not detract from the arguably CFSP orientation of the JAES. Indeed, as indicated above,¹⁴⁹ the EU can pursue any of its external policy objectives towards Africa through any of its external policies. Internally, the various Commission Directorates-General (DGs) have a shared responsibility, involving not just DG DEVCO but also other DGs concerned with the different partnerships of the JAES.¹⁵⁰ In doing this, the Commission also established an Africa Intra-Service Task Force whose overall goal is to enhance coherence and seek greater synergies in the implementation of the JAES and its Action Plans.¹⁵¹ Mangala explains that this is different from the pre-JAES frameworks of EU external action towards SSA where DG DEVCO and DG Trade held sway, dealing with the other DGs in a vertical manner.¹⁵² However, a contrasting view indicates that DG DEVCO is mainly involved in the implementation of the JAES to the extent that it is this DG, rather than DG Trade, which co-

¹⁴⁶At fn 7.

¹⁴⁷Mangala, fn 136 above, p 31.

¹⁴⁸Ibid.

¹⁴⁹At 7.2.2.

¹⁵⁰Ibid; also see Directorate B Study, fn 115 above, p 23.

¹⁵¹Mangala, fn 136 above, p 32.

¹⁵²Ibid., p 32. Of course, this is relative, as DG DEVCO is relatively subterfuge to DG Trade in most aspects of EU external action towards SSA. Illustrative is the analysis in Chapters Three and Four on development policy and trade policy respectively.

chaired the Trade partnership and coordinated with other EU institutions and Member States.¹⁵³ This latter view is more plausible in the light of the light touch approach to trade in the relevant JAES partnership as discussed above.¹⁵⁴ Of course this, and the attendant criticism of the lack of political dialogue in the JAES for addressing challenges interconnected with EPAs¹⁵⁵ illustrate the specificity of EU trade policy as argued elsewhere in this thesis.¹⁵⁶ Furthermore, it renders the Commission's effort at enhancing coherence otiose. More pertinently, it is also a further illustration of the point made above that the institutional dimension of the JAES follows the traditional institutional distinction between the distinct EU policies even if it does this flexibly. Indeed, the peace and security partnership of the JAES framework is specifically conducted under the CSDP to the extent that its distinct institutional dimension has been given to separate special analysis in some studies.¹⁵⁷ Suffice it to state that the key distinguishing institution in this regard are the PSC and the EU Military Committee (EUMC)¹⁵⁸ which conduct the CSDP as discussed in the previous Chapter.¹⁵⁹

Without needing to go into the roles of the Council in the different partnerships, it is enough to say that its involvement in the implementation of the JAES is mainly through the Ministerial Troika of the JAES. On the EU side, this usually involve the foreign ministries from the country holding the EU presidency and the country that will hold the next presidency plus the Council Secretariat and the Commission.¹⁶⁰ Going by the institutional distinction between the JAES

¹⁵³See Directorate B Study, fn 115 above, p 23.

¹⁵⁴See 7.3.2.2. above.

¹⁵⁵See Directorate B Study, fn 115 above, p 23.

¹⁵⁶See Chapter Four of this thesis.

¹⁵⁷See for example Tywuschik and Sherriff, fn 48 above; Elowson, fn 91 above; and also Pirozzi, fn 136 above.

¹⁵⁸See Pirozzi, fn 136 above, p 22.

¹⁵⁹See Chapter Six of this thesis at 6.4. And for a detailed analysis of the institutional dimension of the peace and security partnership, see for example Tywuschik and Sherriff, fn 48 above; Elowson, fn 91 above; and also Pirozzi, fn 136 above.

¹⁶⁰Pirozzi, fn 136 above, p 19, fn 33 inclusive.

partnerships, it could be presumed that the assignment of members of the Council in this context would follow the existing policy-oriented EU Council configurations.¹⁶¹

The third institutional aspect of the JAES on the EU side is the EU Member States. However, in this case even though they agreed to the JAES, the Member States are given the option to join which of the eight partnerships they are interested in.¹⁶² Effectively, the EU Member States are not fully tied to any of the partnerships and can withdraw from one to join another. Under, this circumstances, there is no assurance of commitment despite the agreement to a binding partnership, and it has been reported that only a few Member States are seriously committed to the JAES.¹⁶³ In general, the free hand which the Member States have within the context of the JAES leads to a situation where the Member States that are involved in the different partnerships appear to be doing their own things.¹⁶⁴ While this implicates vertical coherence, this dimension of coherence is outside the scope of this thesis.¹⁶⁵

In the case of the European Parliament, its role in the context of the JAES is mainly advisory,¹⁶⁶ as it is in most other EU external policies discussed in this thesis.

The study has not unearthed any involvement by the HR/VP in the JAES. However, it could be argued that she is indirectly involved in so far as the EEAS in her service is involved. For example, the 2011-2013 Action Plan recognised and expressed the need to establish systematic

¹⁶¹See Chapter Two of this thesis at 2.5.3.2. above.

¹⁶²For this view and for the dispersal of the Member States membership in the different partnerships see, Tywuschik, and Sherriff, fn 48 above, p 16.

¹⁶³Ibid, p 18.

¹⁶⁴See 7.5 below.

¹⁶⁵See 7.2.1. above, especially fn 42.

¹⁶⁶See in general, Directorate B Study, fn 115 above.

and structural linkages between the EEAS structures and the implementing institutions of political dialogue under the peace and security partnership.¹⁶⁷ Furthermore, the EEAS is represented, as is the Commission,¹⁶⁸ on the Joint Coordination Committee (JCC) of the APF which funds the peace and security partnership. This is not surprising as both are responsible for the programming of the EDF which the APF is drawn from. Apart from this, the HR/VP and the EEAS are also indirectly involved in the JAES implementation through the unexpressed role of EU Delegations to the AU¹⁶⁹ in the flexible institutional framework of the JAES. In line with the constitution of the EEAS as discussed in Chapter Two, EU Delegation to the AU comprises a Commission component on the one hand, and a Council component on the other hand. The latter includes the EU Special Representative (EUSR) which also double-hats as the Head of EU Delegation to the AU.

Otherwise, as explained above,¹⁷⁰ the JAES implementation has tended to focus on technical issues such as events, meetings and workshops. And these are carried out within the JEGs which are not EU institutions.

7.4.3. Institutions and enforcement of the JAES

From the foregoing, the politico-legal character of the JAES is undeniably clear. Even when it is seen only through a soft law lens, this would not lead to any conclusion of possibility of legal enforcement. Hence, the enforcement role of the Commission and the Court of Justice of the European Union is not engaged here. Moreover, there are clearly no fixed institutional

¹⁶⁷Joint Africa EU Strategy Action Plan 2011-2013, p 17.

¹⁶⁸The 7th meeting of the African Peace Facility (APF) Joint Coordination Committee (JCC) took place in Addis Ababa, Ethiopia on 18 October 2011, was co-chaired by a representative of the Commission and the EEAS with a representative of the African Union.

¹⁶⁹Mangala, fn 136 above, p 33. As discussed above, the JAES is implemented on a continent to continent basis as represented in this context by the EU and the AU.

¹⁷⁰At 7.3.3.

responsibilities in the context of the flexible framework of the atypical JAES. Of course, this is not a huge loss, considering the near impossibility of enforcing the requirement of coherence legally in a politically charged EU foreign policy.

7.4.4. Of the HR/VP and the EEAS in the context of the JAES: what added value?

The foregoing study underscores the point that the functional distinction between EU external policies is here for the long haul,¹⁷¹ and significantly attendant to this are the institutional distinctions which could only potentially be bridged by the HR/VP and the EEAS at her service. The JAES does not change this. As explained in Chapter Two of this thesis, the HR/VP and the EEAS have not replaced the original institutions of EU external action. Rather, they are framed as institutional bridges to enhance, if not ensure coherence in EU external action. However, how they will do this in the light of the ambiguous policy and institutional constellation of the JAES is not clear. Overall, it remains to be seen whether the effective implementation of the Lisbon Treaty and the attendant institutional changes will facilitate greater coherence of EU policies towards SSA including within the context of the JAES. Invariably, it is worth reiterating that the potential of the HR/VP and the EEAS to effectively act as a bridge across the relevant distinct policies is at all times dependent on political will, sometimes of the traditional EU institutions, and at other times of the Member States. As discussed in Chapter Six of this thesis, the latter would mainly be the case with regards to the construction of a united whole *vis-a-vis* synergy in the sequencing of available policy options especially as it relates to peace and security. Illustrative is the Mali case study.¹⁷²

¹⁷¹See in general, Craig, P, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010), p 422-436. Indeed, as discussed in Chapters Two and Five of this thesis, this has always been and is still the will of the Member States.
¹⁷²See 7.5. below.

7.5. The JAES and SSA: Mali case study

As indicated above, even though the JAES is not a policy but an overall framework traversing the different fields of EU external policy towards Africa, this Chapter follows the structure of the relevant previous Chapters of this thesis on the distinct EU policies. This is mainly for ease of reference. Therefore, on the back of the framework of the JAES discussed above, this section discusses Mali as a case study for the conduct of the JAES as an instrument of coherence in EU external action towards Africa with a special reference to SSA. This is with a view to determining its overall contribution to the enhancement of coherence in EU external action towards SSA in general, and also policy coherence for development in the same context.

In general, it is noteworthy that this case study is unavoidably the shortest case study in comparison with the other Mali case studies provided in the relevant previous Chapters of this thesis.¹⁷³ This is because of that simple reason that the JAES is not a distinct policy but a framework that encompasses the distinct EU external policies towards Africa including those that were discussed in the previous Chapters of this thesis.¹⁷⁴ The pertinent background for the case studies as they relate to these policies have already been set out in the relevant Chapters,¹⁷⁵ and therefore does not need to be repeated here. In contrast, a summary contextual background will be provided as is necessary to aid an easy flow to the subsequent discussion of the impact of the JAES on the quest to enhance policy coherence for development and coherence based on the construction of a united whole *vis-a-vis* synergy in the sequencing of available policy options with a specific focus on the Mali crisis.

¹⁷³See Chapters Three to Six of this thesis.

¹⁷⁴*Ibid.*

¹⁷⁵See Chapter Three of this thesis at 3.5.1.; Chapter Four at 4.5.1.; Chapter Five at 5.5.1.; and Chapter Six at 6.5.1.

7.5.1. JAES and Mali: a pertinent background

As explained in Chapter One of this thesis, Mali is one of the countries of SSA associated to the ex-Community under Part IV of the Treaty of Rome. The focus of the association in terms of EU external policy were development and trade where were interwoven in the framework of the successive association agreements between the EU and its Member States on the one hand and the associated countries of SSA including Mali.

In terms of development, Mali has since 1971 always ranked as one the world's least developed countries, and with time become so aid-dependent that it also become a donor's darling and a "testing ground" for new aid modalities.¹⁷⁶ The EU therefore has a long history of development policy in Mali as discussed in Chapter Three of this thesis. Although the EU also has a long history of Trade policy towards Mali as an integral part of its development policy towards the country, EU trade policy towards SSA including Mali is gradually evolving as a separate framework due to the evolving Economic Partnership Agreements. This is in contrast to the traditional practice of entwining trade and development policy towards the region in the successive association agreements including the contemporary Cotonou Partnership Agreement which primarily regulates EU relations with SSA. As discussed above, apart from the autonomous EU external action towards SSA under the CFSP and CSDP frameworks of EU external action, the Cotonou Partnership Agreement was the only framework for EU external relations with SSA prior to the JAES. It was therefore the fulcrum of EU development policy towards SSA including as it evolved to accommodate the MDGs. The above study reveals that the MDG partnership under the JAES framework was redundant so that the MDGS were solely

¹⁷⁶Loquai, C, 'Supporting domestic accountability in developing countries: Taking stock of the approaches and experiences of German development cooperation in Mali' (ECDPM Discussion Paper No. 115, July 2011), p 1.

pursued through the Cotonou Agreement framework. In the same vein, the Trade partnership is less about trade as an integral part of development policy under the same framework. In general, the analysis of the JAES framework illustrates that has tended to focus on technical issues such as events, meetings and workshops. It follows that the JAES framework does not offer the parameters for assessment of policy coherence for development or coherence based on the construction of a united whole *vis-a-vis* synergy in the sequencing of available policy options beyond what obtains from the assessment of these dimensions of coherence in the interaction between the relevant distinct policies discussed in the relevant previous Chapters of this thesis.¹⁷⁷

Having said that, it has to be admitted that the same dismissal to the other partnerships would not apply to the peace and security partnership which is deemed the most successful in the JAES framework. In this regard, this partnership offers the only flicker of light of opportunity to meaningfully discuss the JAES in the light of the dimensions of the requirement of coherence discussed in this thesis.

7.5.2. The JAES peace and security partnership and the Mali crisis

The background to the Mali crisis have been extensively provided in the last two Chapters of this thesis. It is therefore difficult to say anything new about that in a bid to discuss the role of the JAES peace and security partnership in the crisis especially as it relates to coherence. As discussed above, the JAES is not a specific policy, and accordingly it does not have any specific dedicated funding mechanisms, and all its activities have to be financed under existing

¹⁷⁷Also see Chapter Eight of this thesis.

arrangements.¹⁷⁸ This means that the funding for the peace and security partnership also derives from the European Development Fund even though the former is rebranded the APF. In practice, the peace and security partnership is also conducted under the CSDP. Hence apart from the direct operational aspect of the CSDP which cannot be looked at outside the CSDP framework, there is no clear difference between the indirect support for building African capacity in the context of African Peace and Security Architecture (APSA)¹⁷⁹ under the CSDP framework on the one hand, and under the peace and security partnership of the JAES framework on the other hand. In this regard, while the indirect support for building African capacity was discussed with special reference to SSA using Mali as a case study in the previous Chapter of this thesis under the CSDP framework, Biondo discusses this in her assessment of the peace and security partnership under the JAES framework.¹⁸⁰

In general, the analysis of EU external action towards SSA under the CSDP framework using Mali as a case study in the previous Chapter illustrates that balancing the provision of direct, operational support with support for building African capacity presents a challenge for the EU.¹⁸¹ Or better still, it illustrates that the EU prefers the indirect support for reasons that cuts across internal and external factors. For example, as will be recalled from the previous Chapter, following the call for the international community including international organisations to become involved in the bid to resolve the budding conflict in Mali,¹⁸² the EU embarked on the plan for EU Training Mission (EUTM).¹⁸³ This was an indirect approach which entailed

¹⁷⁸Ibid.

¹⁷⁹Which is an AU instrument.

¹⁸⁰See Biondo, K, 'Moving beyond a Donor-Recipient Relationship? Assessing Partnership in the Joint Africa-EU Strategy', KFG *Working Paper* No. 63, February 2015, p 14.

¹⁸¹This is a reconfirmation of the same report regarding Darfur (see House of Lords, para 365).

¹⁸²*Vis-a-vis* the UNSC Resolution 2071 of October 12, 2012 (authorising ECOWAS and the AU as the key regional and African continental security mechanisms respectively, to develop a plan for military intervention in Mali.

¹⁸³European Union External Action, Common Security and Defence Policy (CSDP), EU Training Mission in Mali

capacity building by way of providing training and advice to the Malian armed forces. The factors that came to bear on the Unions' decisions have been discussed in the previous Chapters of this thesis and does not need to be repeated here. What matters for the purposes of this analysis is that while the Union was quick to respond with a decision to send a EUTM to Mali during the less aggressive stage of the conflict, it did not maintain this response reflex at this latter and more aggressive stage of the conflict when a peace keeping force was required. As the ECDPM stresses, for the EU, it should not be a question of choosing between operational support or capacity-building, but rather simultaneously balancing the two.¹⁸⁴ In any event, it is most pertinent to note that there was no express reference to the framework of external action which the EU deployed the EUTM under.

By and large, it can be argued that the JAES is not in fact different in any way from the other distinct policies of EU external action which it acts as new political framework for. Indeed, it may safely be argued that while the JAES has successfully mobilised thematic partnerships through a common framework, this does not automatically amount to synergies between these thematic partnerships, or the distinct EU external policies covered by the partnerships. Even though it was adopted at the same time as the Lisbon Treaty which focuses heavily on coherence, the JAES framework does not have any expressed clear cut roles for the HR/VP and the EEAS. Of course, this is not surprising in the light of the haphazard way that the partnerships are organised. It follows that neither the requirement of policy coherence for development, nor coherence based on the construction of a united whole *vis-a-vis* institutional and functional synergy in the sequencing of available option is effectively enhanced by the JAES framework. Overall, the JAES has not ameliorated the pending general conclusion that the reform of

(EUTM Mali), EUTM, Mali/1, January 13; Council Decision 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) [2013] *OJ L14/19*, p 1.
¹⁸⁴House of Lords, fn 38 above, para 366.

external action with the creation of the EEAS has not eliminated old coherence challenges in EU policies towards SSA.¹⁸⁵ However, this does not mean a complete lack of prospect. Current practice is to hold summits approximately every 3 years. With the Cotonou agreement and its funding dimension coming to an end in 2020, that year may be relevant to hold a promising summit closing a new 7-year cycle of partnership.¹⁸⁶

7.6. Conclusion

From the foregoing, it can be concluded that the JAES is by all intents and purposes an instrument for coherence in EU external action towards Africa in general, and policy coherence for development especially in the context of EU external action towards SSA.¹⁸⁷ However, it had been argued that in its practice, which mainly revolves around financial and technical support and political dialogue, the JAES follows the functional and institutional distinction between the distinct EU policies as discussed in the previous Chapters of this thesis. Conversely, the Chapter suggested that this is not surprising in so far as the JAES framework is not a separate policy but a framework built on, and intended to deepen the original frameworks of EU external action towards the African continent through further financial and technical support and also strengthened dialogue as the Mali case study illustrates. Against this background, it was further argued that it would nevertheless not be correct to conclude that the JAES does not have any prospects of contributing to the coherence of EU external policies towards SSA, including policy coherence for development, especially as it is flexible in following the traditional functional and institutional distinction between the relevant distinct EU policies. This, the Chapter conclusively asserted, remains the case even though the potentials of the HR/VP and

¹⁸⁵Directorate B Study, fn 115 above, p 12.

¹⁸⁶Directorate B Study, fn 115 above, p 28.

¹⁸⁷Where the later mainly applies.

the EEAS in her service to enhance coherence in this context also follow their general potential to enhance the coherence of EU external policies towards SSA, including policy coherence for development as discussed in the context of the interaction between the distinct EU policies towards the region examined in this thesis.¹⁸⁸ Overall, the Chapter reconfirms the pending general conclusion that could be drawn from the overall analysis in this thesis namely that the reform of external action with the creation of the EEAS has not eliminated old coherence challenges in EU policies towards SSA, and the JAES has not ameliorated this, and that at all times, the coherence of EU external action towards SSA in general, and policy coherence thereto, is a matter mainly dependent on the political will of the Member States, and sometimes, the relevant traditional EU institutions. The latter remains the case post as pre-Lisbon.

¹⁸⁸See Chapters Three to Six of this thesis; and also Chapter Eight which offers the overall conclusion to the thesis.

Chapter Eight

8.0. General Conclusions: what coherence?

8.1. Introduction

The principal aim of the Lisbon Treaty with regards to external relations is to address the pre-Lisbon concerns about the coherence of EU action. Hence, it can be argued that coherence is the simple litmus test for EU external action in the post-Lisbon era.

This thesis set out to investigate the coherence of EU external action towards Sub-Saharan Africa (SSA) in the post-Lisbon era in light of the requirement of coherence in EU external relations law. This included an investigation of the introduction of the HR/VP and the EEAS with the aim of enhancing coherence in EU external action. The focus was on horizontal coherence in the interaction between EU policies towards the region. In doing this, the thesis uses the key EU policies towards the region, namely development policy, trade policy, the CFSP and the CSDP to investigate (1) the import of the requirement of coherence in EU external relations law with special reference to EU external action towards SSA; (2) How these are reflected in the relevant instruments of EU external action towards SSA; (3) The (potential) role of EU institutions in this regard; (4) the added value of the HR/VP and the EEAS to realising coherence in practice; and (5) the extent to which EU external action towards SSA is coherent as a result of these.

The reason for adopting SSA as a regional focus was discussed in Chapter One. From all indications, SSA is arguably the best comprehensive regional context or case study for an analysis of the requirement of coherence in EU external relations law in practice. For example, as also discussed in Chapter One, EU external action towards SSA is a classic field of EU

external relations and arguably, the Union's oldest and most comprehensive external relations or foreign policy. Deeply rooted in the history of the European Communities, it evolved from a primary focus on development and trade in the pre-90s, to foreign and security policy in the early 90s.

With specific regards to the needs underlying the requirement of coherence in EU external action, it was submitted in Chapter One that this is arguably of most importance in the context of EU external action towards SSA. For example, with regards to the link between coherence and effectiveness, there can be little doubt that ineffective EU policies often affect the effects of EU development policy towards the region which costs the Union a considerable amount of human, material and financial resources. Moreover, the geographical proximity between Europe and Africa means that ineffective EU policies hold with it some political and economic implications for Europe itself. Perhaps, the most recent example is the migration crisis in the Mediterranean, which has inevitably exposed Europe to the effects of extreme poverty or violent conflicts in SSA.

Within the limited confines of this thesis, it was impossible to examine all the 49 countries of SSA. Consequently, a country case study of Mali was provided. This is mainly for topical reasons. Mali is the most recent country of SSA where the need for an all-EU approach bordering on the construction of a united whole arose. As also discussed in Chapter One, an all-EU approach bordering on the construction of a united whole *vis-à-vis* synergy including institutionally and with regards to instruments and the appropriate sequencing of available policy options, is the essence of coherence. Overall, Mali inspires a reflection on a geographically focused, evidence-based assessment of the coherence of EU external relations

law and policies towards SSA. However, the use of this country case study inevitably comes with the limitation that it may not be completely representative in so far as there are as much differences as similarities in the countries of SSA.

8.2. Findings

While the findings of this study are modest, they may enable a more realistic view of the sophistication and complexity of the issues at stake especially in the context of EU external action towards SSA. This puts in context any ideas and suggestions for enhancing coherence in the same context.

In general, the benchmark for the assessment of coherence in this study is EU development policy towards SSA as discussed in Chapter Three using Mali as a case study. This is in line with the discussion in Chapter Two that while the EU is committed to the coherence of its external action in general, it is particularly committed to policy coherence for development. This, renders development policy the benchmark for assessing the coherence of EU external action towards SSA. Significantly, the Union's development cooperation objective of poverty reduction, and eventual eradication which was only codified in the Treaties at Lisbon, was even prior to Lisbon the key objective of EU external action towards SSA. Indeed, this is expressly reflected in the contemporary instrument which primarily regulates EU development cooperation with SSA namely the Cotonou Agreement. Pertinently, this agreement which contains provisions relating to trade and security illustrates not only the wide scope of development policy, but also the fact that other EU policies specific EU external policy are necessary for the achievement of the objectives of development policy. Apart from the procedure for the contribution of the relevant development in this context namely the European

Development Fund, the process of development programming aimed at achieving the objectives of development policy was historically the sole responsibility of the Commission. However, post-Lisbon, the latter shares this role with the EEAS under the joint supervisory role of the HR/VP who is also the Vice President of the Commission. The arguably expected initial inter-institutional conflict between the 'new kid on the bloc' and the Commission which has the oldest presence in SSA appears to have been resolved with a Working Agreement for development programming between the two.

As was argued in this thesis, in this specific context of EU external action towards SSA, all dimensions of coherence, including policy coherence in terms of synergy in the sequencing of available policy options are implicated in policy coherence for development. However, the thesis examined policy coherence for development with reference to the norms and objectives, instruments and institutional dimensions of policies on the one hand, and coherence *vis-à-vis* synergy in the sequencing of available policy options, on the other hand.

The main findings relating to these dimensions of the issue of coherence are chapter specific and were summarised within the respective empirical chapters namely Chapter Four on Trade Policy; Chapter Five on the CFSP; and Chapter Six on the CSDP. This section will synthesise the empirical findings to answer the key research question on the coherence of EU external action towards SSA building on the answers to the role of instruments and institutions including the added value of the HR/VP and the EEAS in enhancing coherence in this regard.

In the first instance, although the EU's commitment to policy coherence for development is well represented in the norms and instruments of other EU policies, the substantial essence of the

requirement as it relates to the key development objective of poverty reduction and eventual eradication arguably differs across the policies. For example, as discussed in Chapter Four, the coherence of trade policy with development objectives is invariably a matter of extent. This is mainly because of the sophisticated and complex nature of the interaction between trade and development in instrument and in practice as the Mali case study illustrates. Indeed, the case study affirms the theoretical finding that although trade can contribute to development, EU trade policy is distinct from its development policy even though the two are historically entwined in the context of EU external action towards SSA. Furthermore, although the analysis of the interaction between EU trade policy and development policy could easily be complicated with the importation of the Common Agricultural Policy into the equation, the latter is a distinct EU policy which is internal albeit not without external effect on EU trade policy. Against this background, the thesis argued that even though the distinct legitimate objectives of trade policy and development policy may collide, the extent of the trade compromise that the Union is required to make in favour of development objectives is indeterminate. Overall, while the pertinent analysis of trade instruments in the Mali case study shows that the EU can always do more, the latter may not necessarily equate to a breach of the requirement of policy coherence for development. Significantly, although there are opportunities for relevant traditional institutions such as the Commission's DG DEV and the development-oriented European Parliament to influence trade in favour of development objectives, trade is a specifically and technical policy field wherein even the HR/VP and the EEAS are excluded. Hence, the post-Lisbon anticipation that the HR/VP and the EEAS will enhance institutional coordination for coherence, including policy coherence for development does not veritably extend to trade. Invariably, the extent of the trade concession that the EU can make in favour of development objectives in its external action towards SSA is ultimately dependent on the political will of the

Member States. Ultimately, and most pertinently, whether EU trade policy is at any time compliant with policy coherence for development or not is a subjective question impossibly seeking an objective answer.

With regards to policy coherence for development as it relates to security policy under the CFSP and CSDP frameworks, the situation is different albeit not conceptually less complicated than the question of policy coherence for development as it relates to trade. For example, as discussed in Chapter Five, the inextricable nexus between security and development wherein one is acceptably a precondition for the other arguably renders policy coherence for development a *façon de parler* in relation to the CFSP security measures. Although the countries of SSA elevate development as a pre-condition for security, the EU prefers the reverse which is not illegal in the light of the irresolution of the hierarchy in the interaction between the two. In any event, even without accepting that the security-development nexus renders the requirement of policy coherence a *façon de parler*, it can be argued that this nexus would still imply that the work of the HR/VP and the EEAS under the CFSP dimension of EU security policy could nevertheless be deemed as automatically coherent with development policy. Consequently, the fact that the Commission is not as involved in the CFSP as the HR/VP and the EEAS are in the development programming process becomes of little or no significance in terms of the assessment of coherence. Moreover, as the Mali case study illustrates, the EU has recently embraced the use of comprehensive instruments aimed at bridging the policy gap between security and development. In practice, this leads to the cooperation of the EEAS and the Commission for the same purpose. Illustrative is the Sahel Strategy which applies to Mali and other countries of the Sahel region.

Although the CSDP is an integral part of the CFSP and is embedded in the latter's framework as codified at Lisbon, the former's specificity is illustrated both by its distinct scope of objectives and by its distinct institutional procedure. In this regard, it brings a different dimension to the question of policy coherence for development. In general, the specificity of the CSDP framework as discussed in Chapter Six means that the question of policy coherence for development may not arise in relation to the urgent *ad hoc* CSDP crisis management measures. In practice, the urgency required by the latter would not give room for consideration of any issues beyond the resolution of the crisis at hand. Illustrative is the Mali case study where a *coup d'etat* quickly spiralled to violent crisis as discussed in Chapter Six. Indeed, although the CSDP structures are *prima facie* a part of the EEAS and are under the HR/VP as represented in the EEAS organogramme, by virtue of Article 3(2) of the Council Decision on the creation of the EEAS, the CSDP is expressly excluded from the areas in which the EEAS and the Commission are required to consult each other in the exercise of their respective functions. This is despite the fact there is an overlap between the conceptual scope of the CSDP and development policy.

Overall, it could be argued that the question of policy coherence for development in terms of policy aims in EU external action towards SSA is mainly relevant in the context of trade policy. However, from a legal perspective, even in that case it remains a question of extent, and hence, a subjective question impossibly seeking an objective answer.

Having said that, it is noteworthy that the above conclusions do not mean that the question of policy coherence for development may otherwise not be impacted specifically by the CFSP and the CSDP. Indeed, as indicated above, this thesis argued that in the specific context of EU

external action towards SSA, all dimensions of coherence, including policy coherence in terms of synergy in the sequencing of available policy options are implicated in policy coherence for development. Suffice it to state that the attendant ineffectiveness of as may result from any type of incoherence will impact on development policy and its objectives. For example, , when the usefulness of the long term instruments of the CFSP arguably ended with the impending crisis occasioned by the *coup d'etat* in Mali in 2012, the urgent *ad hoc* CFSP diplomatic instruments were not visibly engaged immediately for that stage of conflict. There can be little or no doubt that the progression of the crisis endangered wider the wider EU external objectives towards SSA, in particular the key objective of development. Without needing to cynically submit that the Union's action at this stage would have certainly arrested the further progress of the crisis, it could be argued that the latter may well have been a possibility had the Union exhibited a coherent external action towards Mali by appropriate synergistic sequencing of the available policy options at this stage. Indeed, it could be deduced from the impact of the eventual appointment of the EUSR for the Sahel that an earlier appointment in this regard may have been helpful even if the extent may not be known. Having said that, it is noteworthy that the conclusion relating to the failure of the EU to engage an urgent *ad hoc* CFSP instrument in Mali has to be qualified. The qualification is necessary in so far as diplomatic instruments are not always openly deployed and the investigation in this thesis is only based on available instruments. In any event, the Union would not be totally absolved from all charges of incoherence in its external action towards SSA gauging from the Mali case study. For example, there is also the Union's incoherent (in)action under the CSDP framework in Mali. In particular, a relevant CSDP peacekeeping operation was not deployed to Mali when required with the intensification of violent conflict in October 2012. This constitutes incoherence in the light of the effects of violent conflicts on the EU development policy programme and its objectives in

Mali. Although no reason was expressed for the inertia in both the wider CFSP and the CSDP context, the thesis revealed some of the possible reasons in both cases. Chief of these would be the very obvious issue of human, material and financial resource which would apply to both the CFSP and the CSDP framework. However, while these which is not different from the old age issue of 'capabilities-expectations gap' can veritably influence the possibility of adopting a relevant measure, this could sometimes only be the partial reason. For example, as discussed in Chapter Two, the historical background of EU relations with SSA continue to trail the relationship between the two. In general, while the EU Member States at the heart of the historical relations between Europe and SSA are arguably keen to *Europeanise* their foreign policy, their 'European reflex for SSA' is not always matched by the 'European reflex' of other Member States who traditionally had no Africa policy. Of course, the former have more interests in SSA than the latter could resource to the argument of resource limitation or fear of intervention without an end to avoid a decision for the EU to act. Significantly, the CFSP and CSDP arrangements do not force the Member States to adopt a common policy. Furthermore, with specific regards to the CSDP, there is also the limitation relating to the operational flexibility of CSDP crisis management. With regards to this last factor, there is as yet no common standing personnel for CSDP operations and the possibility of an operation completely depends on the willingness of EU Member States to contribute the needed personnel. As discussed in Chapter Five, Mali was a former French colony and has long been a priority for French, and to a lesser extent Spanish foreign policy. Hence, both countries tried to push for more EU engagement in the Mali crisis for some time without much success. Indeed, it was not until the deaths of European hostages did other Member States, notably the UK, take interest in the crisis. Overall, although it was subsequently to gain the support of some other EU Member States, after France which arguably have more vested interest in Mali than any other EU

Member State failed to convince the latter on the need to respond to the call for military intervention in Mali, it eventually took the initiative to answer the call with its *Operation Serval*.

By and large, the possibility of a CSDP action is outside the powers of the HR/VP and the EEAS, and their influence regarding the relevant unfavourable factors may be quite limited, if at all possible. This is because they are not involved in CFSP decision-making. Although the HR/VP chairs the Foreign Affairs Council, she is not a member of the Council for decision-making purposes and can only rely on effective persuasion. Suffice it to state that whatever influence the HR/VP and the EEAS may wield would ultimately depend on the political will of the Council which is the decision-maker.

Of course it could be argued from a legal perspective that the Member States may be acting illegally if they renege from their obligations under the adopted legal CFSP decisions. For example, while the provisions of the Treaties that require them to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity, and to refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations does not force the Member States to adopt CFSP instruments, it is arguable that they are bound to the provisions of any instrument that they do adopt. This would mean that the Member States are bound to the provisions of the Common Position on Conflict prevention in Africa which requires the coherent use of all the instruments available to the EU, including preventive diplomacy for conflict prevention and CSDP operations for crisis management. However, as argued in Chapter Two, the law of EU external relations is not free from the malaise of the difficulty or near impossibility of bringing foreign policy under the grasp law.

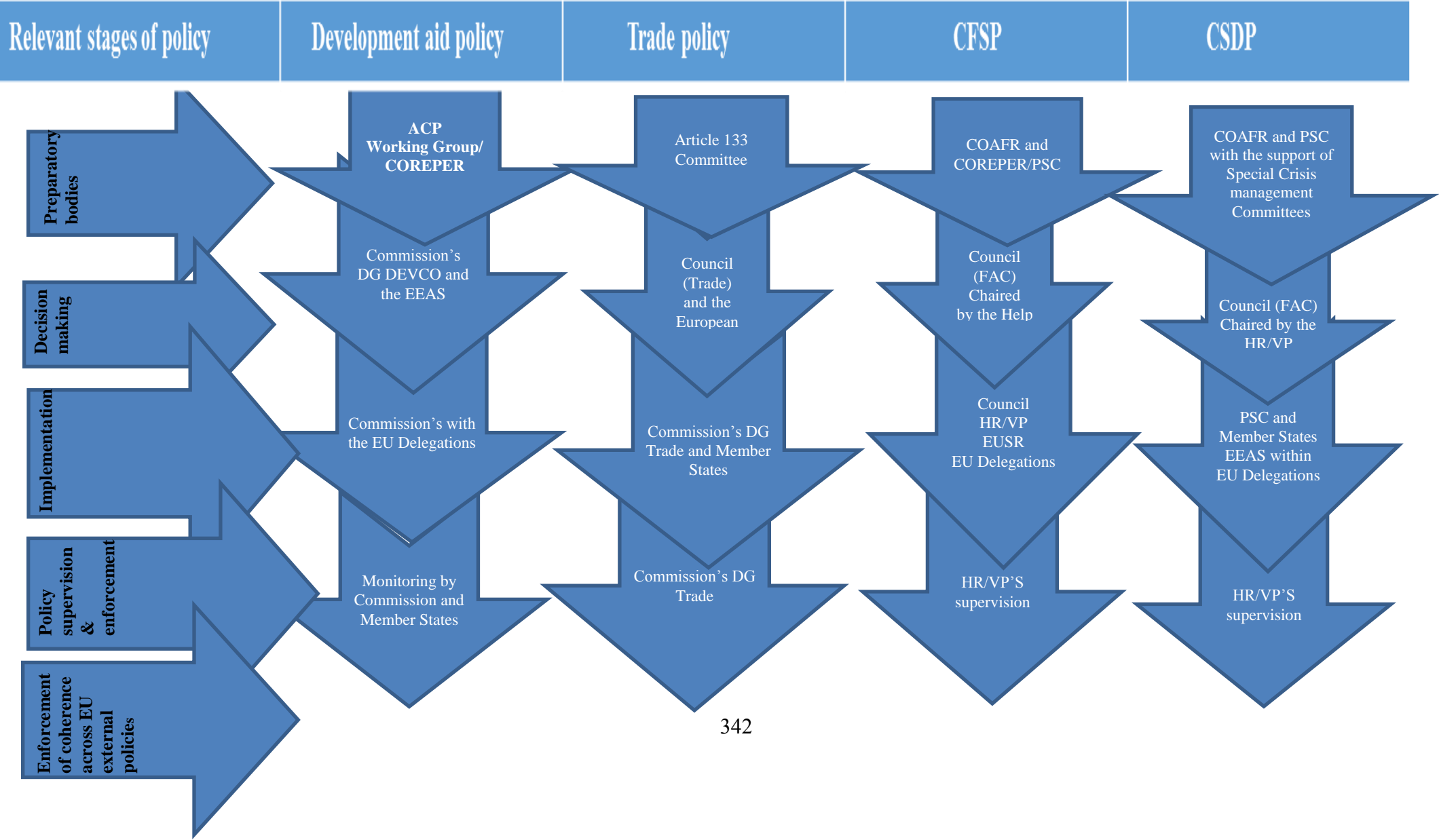
In general, the framework analysis and the Mali case study together illustrated that while the post-Lisbon legal changes and the introduction of the HR/VP and the EEAS are positive developments with regards to coherence, they have not resolved, and may not completely resolve the issues that arise in relation to policy coherence for development on the one hand, and the overall coherence of EU external action as it relates to synergy in sequencing of available policy options, especially in the context of EU external action towards SSA. Significantly, as the analysis of the Joint Africa EU Strategy (JAES) in Chapter Seven illustrated, the JAES follows the functional distinction between EU policies. This means that the role of the HR/VP and the EEAS in this context does not change from what it is in relation to the distinct policies as concluded above.

8.3. Recommendations

The foregoing reflects the complexity of the issues at stake, and indeed calls to mind the Page and Mold's opinion that the coherence rhetoric may outstrip resources, performance and legal provisions. Indeed, their call for the requirement of coherence to be toned down resonates against the background of the foregoing. This does not mean that there is nothing the Union can do to address some of the issues raised. For example, with specific regards to policy coherence for development, it may be that the Union need to more clearly express the distinction between its trade policy and development policy towards SSA, and in doing so state what it could or cannot do with regards to policy coherence for development. While such transparency could stoke a debate, it would at least mean that the Union is not setting itself up for failure by its own standard. With regards to the overall coherence of EU external action *vis-a-vis* synergy in the sequencing of available policy options, the Union would definitely need to raise and commit more resources. In doing this, it could also target the Member States without prior foreign policy

experience in SSA, with materials and programs aimed at creating awareness of the (potential) impact of the development and security problems in SSA on Europe and EU citizens.

Illustration
Figure 1: The diagram below illustrates the four key policies of EU external action towards Sub-Sahara Africa and their key institutions (own illustration)



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